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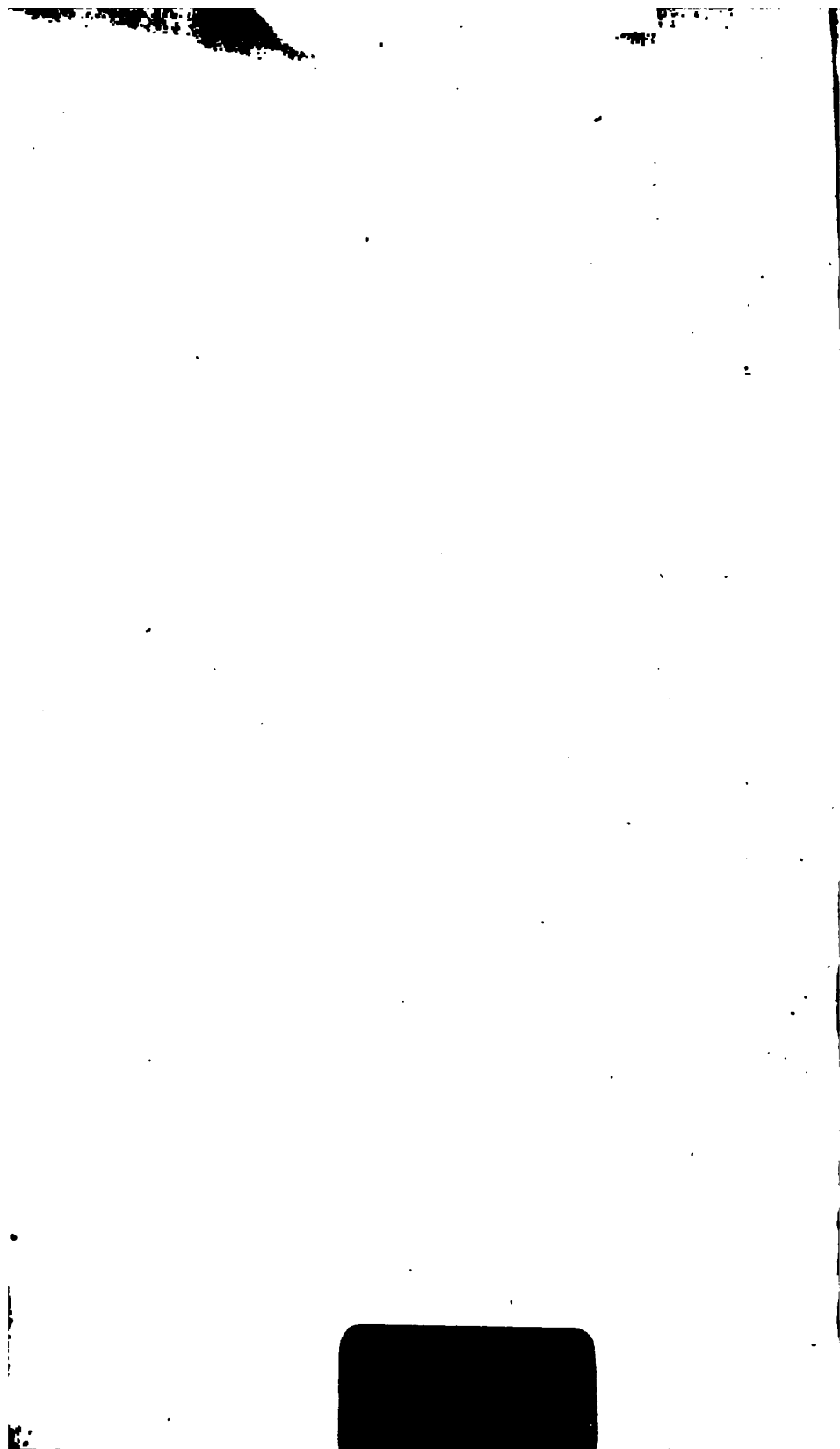
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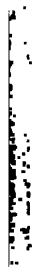


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REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
**English Ecclesiastical Courts:**  
WITH  
TABLES OF THE CASES AND PRINCIPAL MATTERS.

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EDITED BY  
EDWARD D. INGRAHAM, Esquire,  
OF THE PHILADELPHIA BAR.

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VOL. V.

CONTAINING  
HAGGARD'S REPORTS, VOL. III.  
AND  
SIR GEORGE LEE'S CASES, VOL. I.

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PHILADELPHIA :  
P. H. NICKLIN & T. JOHNSON, LAW BOOKSELLERS,  
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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
ECCLESIASTICAL COURTS,  
AT  
**Doctors' Commons;**  
AND IN THE  
HIGH COURT OF DELEGATES.

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By JOHN HAGGARD, LL. D.

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VOL. III.

CONTAINING CASES FROM MICHAELMAS TERM, 1829, TO HILARY  
TERM, 1832; AND SOME CASES OF AN EARLIER DATE.



# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## ECCLESIASTICAL COURTS.

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ARCHES COURT OF CANTERBURY.

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### HAMERTON v. HAMERTON. (a)—p. 1.

Where the evidence did not amount to judicial proof of the wife's adultery, but her conduct had been so culpable as to raise strong suspicions of criminality and induce the Court to rescind the conclusion to admit fresh evidence, proof, that during the progress of the suit the alleged *particeps criminis* had frequently visited her alone, and remained late at night, will, coupled with the former evidence, found a sentence of separation.

THE Decree of the Arches Court, rescinding the conclusion of the cause for the admission of further evidence, having been affirmed by the High Court of Delegates, and the cause remitted; an additional allegation on the part of Major Hamerton, was, on the by-day after Trinity Term, admitted to proof: pleading in substance, that "in the spring, and up to the month of June, 1828, Mrs. Hamerton was residing in lodgings at Paris, attended only by one female servant; that Bushe was in the constant habit of visiting her, frequently dining and remaining alone with her till a late hour of the evening; that there was a sofa in the room, and that Mrs. Hamerton's bedroom adjoined; that in the latter end of May, Mrs. Romer came to Paris and resided with her daughter, during which time Bushe did not visit her; that in June Mrs. Hamerton went to Switzerland, where she was joined by Bushe, and that they returned to Paris in October; that she and Bushe still reside there, but that their place of residence has not been discovered; that both before Mrs. Hamerton went to Switzerland, and since her return, she has frequently walked out arm in arm with Bushe, and visited the theatres and other public places in his company, and that they still continue to carry on their adulterous intercourse together."

Upon the effect of the evidence, the Court, after argument, now pronounced its final decision.

JUDGMENT.

SIR JOHN NICHOLL.

The question for my present consideration is, whether the facts pleaded in this allegation are proved: for, if proved, they would, coupled

(a) See *Hamerton v. Hamerton*, 2 Hag. Rep. 8. 618. [4 Eng. Eccl. Rep. 12. 224.]

with the former history at Cheltenham, leave no doubt on my mind that the adultery is established. Two witnesses have been examined: one—Gyde, the clerk of Major Hamerton's attorney—who merely assists in proving the identity, but who had before deposed to seeing Mrs. Hamerton and Mr. Bushe in company together at Paris: the other, Madam Rouquie, the portress at No. 51, Rue Neuve, St. Augustins, the house where Mrs. Hamerton lodged. This witness fully proves the allegation, if she is credited; and there is nothing to affect her credit. She proves that Mrs. Hamerton lodged there; that she was constantly visited by Bushe, who frequently dined there, and was alone with her till eleven at night. She proves also, that for two or three weeks in the latter part of the time, not only was Mrs. Romer, the mother, there, but also an aunt, Mrs. Robinson; and that during such time, Bush visited Mrs. Hamerton less frequently, and staid not so late; and that Mrs. Hamerton and her maid left Paris in June for Switzerland.

In the following winter, this witness and Gyde had an opportunity of identifying Bushe; she is also corroborated by the former evidence of Gyde, who saw Mrs. Hamerton and a female come out of No. 51, Rue Neuve, St. Augustins, and get into a coach in which Bushe was waiting for her, some bundles and a bandbox having been previously put into the carriage. This was on 10th of April, 1828, at the same time that Rouquie deposes that Mrs. Hamerton lodged at this house and was visited by Bushe. True it is that the Court has not before it the evidence of Julie, Mrs. Hamerton's maid; she was, however, long detained for the purpose of being made a witness on this plea, and that object was partly defeated by the time taken up in the appeal of the wife: but under the requisition for the examination of witnesses at Paris, every attempt was made to compel her attendance, as is stated in the return, and in an affidavit annexed. Nor is Madame Mallard, the mistress of the house, produced; but she might not be able to speak at all to the fact of Bushe's visits to Mrs. Hamerton, her lodger on the ground floor. On the other hand, here is not only Mrs. Romer the mother, but Mrs. Robinson, the aunt, who, if Mrs. Hamerton was not at Paris, nor there visited by Bushe in the manner deposed of, might have been examined on behalf of the wife to contradict that part of the case; yet no contradiction has been attempted.

Without, then, imputing either perjury to the witnesses produced, and subornation on the part of the husband and his agents, or collusion between the parties, or rather, both perjury and collusion—neither of which can be presumed—the case is now, taking the whole together, sufficiently proved. The Court, therefore, pronounces for the separation.

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#### JAY v. WEBBER.—p. 4.

A clause, providing against any future expense falling on the parish, need not be inserted in a faculty confirming the erection of an organ by voluntary contributions, and with the consent of the vestry, in a parish church. The sentence of court below affirmed with costs.

A faculty directing the performance upon and repairs of an organ in a parish church to be paid out of the parish rates would be legally objectionable; for the ordinary can only bind the parish to expense for articles absolutely necessary.

Even if the vestry is unanimous, a clause binding the parish to defray, out of the rates, future expenses for an article not necessary, ought not to be inserted.

In collegiate churches organs may be necessary, but not in a parish church.

The ordinary is to judge whether the circumstances of the parish offer no objection to the erection of an organ: the parish alone is to decide on any expenses to be incurred.

A faculty, confirming the erection of an organ, binds the parish to nothing prospectively.

### PEARCE and HUGHES, churchwardens of Clapham v. The Rector, Parishioners, and Inhabitants thereof.—p. 10.

It is no sufficient objection to the issuing of a decree with intimation to lead a faculty for erecting an organ in a parish church, that there is no provision for the future repairs, nor for the permanent salary of an organist.

In a parish church an organ cannot legally be erected without a faculty, nor will a faculty be granted without a decree with intimation in order that any of the parishioners may object; on which objection the court considering all the circumstances of the case is to decide.

### The Office of the Judge promoted by BENNETT v. BONAKER, A. M.—p. 17.

In a criminal suit, a defensive plea tending to show the Promoter's motives to be malicious or vindictive, is admissible, as bearing on the credit of his witnesses and on costs; but it must be specific, and confined to his conduct with reference to the defendant.

A defensive plea in a criminal suit having imputed to the promoter malicious motives, the court is bound to admit a plea repelling such imputations; and presentments, by the churchwarden and vestry, of the clergyman's misconduct are admissible for such purpose, though not as matters of charge or proof in the original articles.

In a criminal suit against a clergyman of unimpeached moral character,—remote charges of omission or irregularity in performing divine service, being shown generally not to be "without just cause:" more recent charges, being completely rebutted: no neglect of duty being imputed for the two years next before the institution of the suit: the clergyman, as to one charge of misconduct, having erred from mistake: and as to two of the remaining charges, (one of which totally misrepresented the fact,) having acted properly:—the court pronounced the articles not proved: and, as no fair ground for a suit existed at the time of its institution, dismissed the defendant with his costs.

The presentment of articles is construed to set forth the nature of the principal charges—the general words only to include subordinate charges ejusdem generis.

Length of time, though it may not amount to a bar to a criminal suit, will induce the court to admit general explanation, instead of requiring a direct contradiction or explanation of each specific fact.

If, in a criminal suit, the charges are clearly proved, unaccompanied by circumstances of reasonable excuse or explanation, the court, presuming the promoter acts from a sense of duty, will not inquire into his motives: aliter, if the misconduct be not proved; or, even if proved, be sufficiently accounted for.

To constitute in a clergyman criminal neglect of duty requiring censure and correction, there must be neglect without just cause: but unless such cause be shown, the law will infer its absence.

In a criminal suit, the court is strictly confined to the offences charged in the articles.

### ROGERS v. ROGERS.—p. 57. 1352. a.

An allegation, pleading facts to infer connivance as a bar to the husband's prayer for a sentence of separation, by reason of his wife's adultery, rejected, because, as no single fact pleaded necessarily inferred a knowledge of the wife's guilt, nor a suspicion that an adulterous intercourse had been, or was about to be formed; and as the whole, taken together, did not warrant an imputation on the husband of consenting to, or intending, his wife's adultery, his conduct laid in the allegation, even if proved, would not amount to connivance; to constitute which there must be intentional concurrence.

A plea of connivance does not necessarily admit adultery.

Connivance is a bar to a suit for separation, by reason of adultery, on the principle that "volenti non fit injuria."

To constitute connivance, active corruption is not necessary; passive acquiescence, with the intention, and in the expectation that guilt will follow, is sufficient:—but, on the other hand, there must be consent, not mere negligence, inattention, confidence, or dullness of apprehension.

Connivance is generally proved by circumstantial evidence.

To support a plea of connivance, when no adultery during cohabitation is charged nor admitted, the clearest evidence of intention and consent would be required. Quære, whether connivance at adultery during cohabitation is a bar to a suit for long subsequent adultery with a different person.

THIS was a suit instituted in the Consistory Court of London, and brought by John Rogers against Mary Ann Rogers, his wife, by reason of her adultery. The libel was admitted without opposition; but an allegation on behalf of the wife, pleading the connivance of the husband, having been rejected, an appeal was prosecuted to this Court. On a former session, the admissibility of the allegation was debated by the *King's Advocate* and *Phillimore* on the part of the husband, and by *Adams* and *Haggard* for the wife, and the Court, on this day, proceeded to give its judgment.

JUDGMENT.

SIR JOHN NICHOLL.

This is an appeal from the rejection of an allegation given on behalf of the wife in the Consistory Court of London. The suit was originally brought by the husband for separation on account of the wife's alleged adultery, and the outline of the case, as stated in the libel, is, that the parties, being both of age, were married in 1810, cohabited at Ranby in Nottinghamshire till June 1829, and had several children, but none of whom are living. The adultery is charged to have been committed with Joseph Whitaker, a young man living at Morton Grange in the same neighbourhood. It is stated that the separation took place in consequence of a quarrel, but no adultery nor any indecent familiarities are charged before the separation. On the separation, the wife went to Leamington, then to Scarthing Moor in Nottinghamshire, where she met Whitaker; and it is alleged that they afterwards arrived together in London, and, at the service of the citation, were cohabiting together in a state of adultery. That is the sort of case set up by the husband.

On the part of the wife an allegation is offered, not defensive in respect to the adultery after separation, but charging the husband with previous connivance—a defence which does not necessarily admit the charge of any adultery. Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has allowed to take place. Volenti non fit injuria (a) is the principle on which the rule has been founded. Several cases have occurred within my recollection when the wife has been dismissed on that ground, though the adultery has been fully proved against her. *Timmings v. Timmings*, (Infra, 22;) *Loverings v. Loverings*, (Infra, 27.) In both these cases the Court held the adultery fully proved, but it held the corrupt connivance of the husband to be likewise clearly established. Allegations pleading connivance have also been admitted in other cases. In *Moorsom v. Moorsom*, (infra, 28) such an allegation was admitted, though the proof of it failed. In *Gilpin v. Gilpin*, (infra,) a similar allegation was also admitted; as well probably also as in several other cases. In these cases it was held, not to be necessary that any active steps should be taken on the part of the husband to corrupt the wife; to induce and encourage her to commit the criminal act. Passive acquiescence would

(a) In *Forster v. Forster*, 1 Consistory Reports, 146. (4 Eng. Eccl. Rep. 360.) Sir William Scott says:—"A fourth defence is, that he has connived at, encouraged, and promoted his own dishonour; for in that case the general rule of law comes in—'Volenti non fit injuria'—no injury has been done, and therefore there is nothing to redress."



be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime; but on the other hand it has always been held that there must be a consent. The injury must be volenti—it must be something more than mere negligence; than mere inattention; than over-confidence; than dullness of apprehension; than mere indifference: it must be intentional concurrence in order to amount to a bar. Thus in *Walker v. Walker*, Lord Stowell, after stating that the adultery was fully proved; that the intercourse was for a long time carried on with considerable secrecy, proceeded:—"The defence is not a denial of the fact, but that which, if established, is said to be equivalent in law. It is said, that the husband connived; but they do not impute active means, but a passive consent. I take the position laid down by Dr. *Arnold*, to be the true doctrine—that passive consent is sufficient; but there must be a consent, an acquiescence of his will; not mere negligence; not too high a confidence, or a misplaced confidence:—there must be evidence that he was passively concurrent; that he saw the train laid for the corruption of his wife; that he saw it with pleasure, and gave a degree of passive concurrence to it." (a)

So in *Moorsom v. Moorsom*, to which I shall presently have occasion to refer more fully, the same learned Judge laid it down:—"The first general and simple rule is, if a man sees what a reasonable man could not see without alarm; if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; but this is not to be too rigorously applied, without making allowance for defective capacity. Dullness of perception, or the like, which exclude intention is not connivance."

Again,—“Though, to bar the husband, there must be intention on his part, I have no difficulty in saying, that mere passive connivance is as much a bar as active conspiracy.”

The evidence to establish connivance can hardly in any case be other than circumstantial: it can seldom happen, that the connivance can be proved by one or two broad facts; that two cases of circumstances can exactly coincide in all their features. In the case of *Gilpin v. Gilpin*, which was so much pressed in argument, several strong circumstances occurred which are not to be found in the present case, as there are circumstances in the present case which did not occur in that case. There, the husband himself introduced the asserted paramour to his young wife, did every thing in his power to promote the intimacy, invited him to visit his wife when he, Gilpin, was from home, requested him to attend her to the rooms at Bath, and, among other circumstances, the fact (strongly relied upon by the Judge in admitting the allegation) of the husband, his wife, and this man walking, one evening, out of Bath to the lodgings of the husband, who remained and slept there, allowing the wife and her gallant to return together to Bath for the night. Even that might have been explained away, but that, and the other circumstances coupled together amounted, on the whole, to such a case of con-

(a) The Court finally pronounced for the separation, concluding its judgment as follows:—"Walker had no intimation or suspicion of criminality till the discovery in October, though he might suspect that she was not sufficiently guarded; he receives the news with the affliction and distress of an affectionate husband: his conduct was inconsistent with that of a consentient husband; though from humanity he did not discharge her till after her delivery. There is nothing in the evidence which in the least tends to show that he is not entitled to relief."

sent and intention as required the Court to admit the allegation to proof.

It will be proper, then, to examine this allegation in order to see whether, if all the facts detailed in it were proved, the Court must impute to the husband this base conduct of consenting to the wife's criminality.

lot.  
8. If the facts are equivocal, the presumption is in favour of the absence of intention: it cannot readily be presumed that any husband would act so contrary to the general feelings of mankind as to be a consentient party to his own dishonour: the effect of which would be to leave him legally bound for life to a corrupt and adulterous wife. It is necessary, therefore, to see what are the facts laid, and also to compare them with some cases which have turned upon the same point.

The allegation pleads, in the 1st article, "that the husband treated his wife with great neglect and severity—was morose and penurious and debarred her of suitable society, though she brought him a fortune of 30,000*l*." These traits of character and conduct do not tend to connivance, and indulging her in criminality: they rather point to cruelty. The Court will, however, for the present, take this to be the true character of the husband.

The 2d article pleads, "that in August 1818, he carried his wife and her sister to Scarborough, left them there with a female servant only, without taking them lodgings." This may show either that, eight years after marriage, he reposed confidence in, or was indulgent to her, or it may show indifference and neglect: but it could not be with a view to Whitaker, for their acquaintance had not then commenced; "that she there became acquainted with Whitaker then of the age of eighteen, that she remained there several months, and that the husband only came to visit her once, and then only for two days." This acquaintance then was of her own making. Whitaker was not introduced by her husband—he was a mere youth, while Mrs. Rogers was nearly forty. Whitaker also was a neighbour, and came from the same parish. This latter part of the article develops only traits in the husband of the same character as those in the earlier part, viz. indifference, indulgence, or confidence, but no marks of guilty connivance.

The 3rd article pleads, "that after Mrs. Rogers' return home Whitaker visited her; that she was often at her Aunt's (till her death in 1827) at Retford, four miles from Ranby, and that Whitaker frequently drove her there in a chaise drawn by his own pony; that Rogers never accompanied her, and refused to buy her a pony."

The 4th article states, "that in 1820 she attended for three days a sale at Garnston: that Whitaker drove her there in the chaise and remained with her during each day's sale; that they afterwards called at his father's, and drove home late in the evening." In these I can see nothing more than the ordinary civilities which pass between country neighbours. Here was an idle young man, living with his parents, glad to employ his time in escorting a lady about; here was a morose, penurious, indifferent husband glad to save himself trouble and expense, but there was nothing from which to infer bad intentions on the part of Whitaker, nor any ground to suspect, on the part of the husband, that he was consentient to his wife's falling the victim to the attentions of this young man.

The fifth article pleads, "that Mrs. Rogers frequently went to the house of Whitaker's father, a mile distant from Ranby: that once, in

1822, Rogers went with his wife when Whitaker's father and mother were from home: that this was his only visit, and that on this occasion Whitaker kissed Mrs. Rogers: that Rogers either was, or pretended to be out of humour with his wife; but shortly afterwards he became in good spirits, and remained till late in the evening."

Rogers might have many good reasons for not forming an intimacy with Mr. and Mrs. Whitaker, the parents of this young man, especially as Rogers was not willing to allow his wife suitable society, being himself morose and penurious; nor does it appear that the father or mother warned Rogers of the danger of permitting the intercourse between their son and his wife, nor were themselves alarmed at it. As to the kiss there is no explanation given of what led to it, nor the manner of it; it might be from some innocent cause and be innocently given, and from the bare manner in which this familiarity is pleaded, it may not perhaps be too much to infer that such was the case. But at all events, what did the husband do? This happened in 1821, seven years before the separation; he thought it an unbecoming freedom; he appeared out of humour at it; and the fact is, that no other kiss, nor any other undue familiarity is alleged to have taken place before the separation.

The 6th and 7th article plead, "that Rogers and his wife took to separate beds in 1822; and, about a year after, to separate apartments, and so continued to live till Mrs. Rogers left the house." "That her first pregnancy occurred in 1823; that the child was currently reported in the neighbourhood of Ranby to be Whitaker's; that after her confinement, Whitaker showed her great attention; adjusted her person and clothes on the sofa, administered her medicines to her in the presence of her husband, and that these attentions were noticed by the servants."

There might be good reasons for this separation; it does not infer crime, nor is it suggested that Whitaker ever slept in the house. If however it is intended to aver that all matrimonial intercourse ceased, and that the child subsequently born was not, and was known by Rogers not to be—what the law presumes it—the child of the husband, the averment should have been direct and pointed, not thus obscure and equivocal; if indeed any such averment could effectually be made, considering the circumstances under which the parties were living at, previous, and subsequent to the birth of the child, and the apparent treatment of it as legitimate. As to the reports in the neighbourhood, servants are apt enough to set such stories on foot, but it is not alleged that the reports reached the husband so as to require him to put an end to the intimacy; there is nothing to show that he was aware that her character was suffering. Again, as to adjusting her clothes on the sofa, servants in a family of this kind are pretty much alive to suspicions of this description. These too are attentions which a dull man, a man of obtuse understanding, a morose, indolent, and inattentive man might allow without thinking any harm would ensue: he would only consider them as officious attentions and civilities from this young man—attentions which undoubtedly would not be allowed by a man of refinement, who would not suffer any one to render what he would be so desirous to pay himself: but from Mr. Rogers' character, he would not be alive to these feelings.

The 8th article alleges, "that during the succeeding years Whitaker was much at Ranby; remained there whole days; Rogers encouraged his visits, went out, leaving Whitaker with his wife; that she frequently

visited the theatre at Retford accompanied by Whitaker, and returned late at night; of summer evenings walked out together arm in arm, that on some occasions Rogers would accompany them a short distance and then leave them, and that on others, when he saw them approaching, he would turn another way." Now all this might go on without a dull morose husband even suspecting it would lead to mischief; considering their disparity of years, he might not surmise that this lady had any such views—he might regard it as mere innocent society, or might have that confidence in his wife that he could not fancy it would lead to mischief.

The 9th article pleads, "that at Worksop market ordinary Whitaker and Rogers dined every week at the same table; that Whitaker went away before Rogers, and was at Rogers' house when the latter returned home." The same observations here apply. Rogers might well suppose that Whitaker had no taste for the enjoyments of Worksop market ordinary, and might prefer going to Mrs. Rogers' house and having his tea there.

The 10th article pleads, "that once in 1827 at Rogers' house, Mrs. Rogers and Whitaker had words; that Whitaker left the house in anger—that Rogers urged his wife to follow him to his father's and apologise." If Rogers thought that his wife was rude, what impropriety was there in his urging her to make up the quarrel? This young man was convenient in attending and escorting her; but it does not follow that the husband had suspicions of improper conduct. All this then might be done with perfect propriety; it might, it is true, be part of a plan to seduce his wife; but the facts do not necessarily lead to that conclusion nor amount to what the law calls "intentional consent."

The 11th article pleads, "that several times in the last six years of their cohabitation, Mrs. Rogers visited Mr. and Mrs. Volans at York, for months together; that Rogers did not accompany her nor go to see her while there; that Whitaker on one or more occasions visited Mrs. Rogers with the knowledge of Rogers, and accompanied her to the coach: that Whitaker did not visit at Rogers' house during Mrs. Rogers' absence, but immediately on her return resumed his visits." This shows inattention to his wife on Rogers' part, but it is not surprising that Whitaker did not visit him, for there were no terms of great cordiality between Rogers and Whitaker; and the latter was the friend and acquaintance of Mrs. Rogers, and did not pretend to cultivate Rogers' intimacy on his own account. Besides it must be remembered, that this article details facts spread over six years; she was visiting her friends, and this Rogers might allow without any intention to forward her guilt. Once or oftener in six years Whitaker called upon her there: this is no more than mere common civility. Mr. and Mrs. Volans were not suspicious of any impropriety, otherwise they would have given some hint to the husband. The facts pleaded show indeed that he was not a very affectionate husband; they may also show that he had great confidence in his wife; but this is very different from establishing that he intended by such neglect to lead on his wife to a guilty attachment, or that he was corruptly conniving at actual criminality.

The 12th pleads, "that upwards of a year before the separation the attentions of Whitaker were the talk of the neighbours and servants." And so they might be, and they might be censorious without any just cause; but it is not stated that the husband was informed of their suspicions.

The 13th and 14th articles merely give a different version from that stated in the libel of the immediate cause of the separation. The 13th article recites the fourth article of this libel, (a), and in contradiction pleads, "that the separation did not take place on account of Rogers' remonstrating because Whitaker had driven Mrs. Rogers from Retford; that Rogers expressed no displeasure thereat; that on the evening of that day Whitaker drank tea and supped with Rogers and his wife, and continued to visit them until Mrs. Rogers left the house."

The 14th pleads, "that Mrs. Rogers, before the 30th May, proposed going to Cheltenham with Whitaker's mother; that Rogers had thereupon fixed that his two sisters should visit him during his wife's absence; that after her return from Retford, on the 30th of May, Mrs. Rogers said she was not then going to Cheltenham; that a quarrel ensued; and he said 'she might go to Hell if she chose'; that on this she proposed a deed of separation, to which he agreed; that instructions were given to his Solicitors at Redford, and were communicated to Rogers; that they came to no final arrangement of terms,—but settled that Mr. Rogers should go to Leamington; that on the sixth of June 1829, Rogers himself ordered the chaise, and that whilst it was waiting, he wrote a letter by her to his seedsman to be left on the road." The arrangement to go with Whitaker's mother, and the visiting at his father's and mother's are pretty strong evidence that no suspicion existed in either quarter, that there was anything wrong in the connexion. The grounds of the quarrel are not material. The husband and wife disagree; he uses a very coarse expression; a separation is to take place; and Mrs. Rogers to go to Leamington: but, so far from suspecting her guilt, the husband sends for a chaise and gives her a letter to convey for him.

In the whole of this allegation I do not see any one fact from which the Court can necessarily infer a knowledge of the wife's misconduct, nor even a suspicion that an adulterous intercourse was formed or was about to be formed; nor is the whole taken together sufficient to warrant the Court in imputing to the husband a consent to the wife's dishonour, nor an intention that she should form an illicit connexion, nor even in concluding that adultery had been committed before separation; for none is charged nor admitted, though something of an insinuation of that sort may be intended in the articles respecting the separate beds and rooms, and the subsequent birth of a child.

Rogers is described as morose, penurious, and unkind; not as an affectionate, attentive husband—warmly attached to his wife. A husband of the former description is not likely to perceive attentions which would excite the alarm and rouse the jealousies of the latter. The warmer the affection, the more jealous and vigilant and the more likely to take alarm is the person who entertains such affection. Rogers had also been married nearly ten years before the acquaintance began; and he might feel, and must naturally be presumed to feel, full confidence in his wife's chas-

(a) The 4th article of the libel pleaded—"That on the 30th of May, 1829, Rogers remonstrated with his wife for suffering herself to be driven home by Whitaker from Retford, and intimated that he (Whitaker) should not come to his house again; whereupon Mrs. Rogers became very angry, and, flying into a passion with her husband, declared that she would no longer live or cohabit with him, and insisted upon a separation. That various differences and altercations having previously taken place between Rogers and his wife, he at length agreed thereto; and instructions were given to a Solicitor to prepare a deed of separation; but whilst the same was in preparation, to wit on the 6th of June last, Mrs. Rogers quitted the house and society of her husband."

tity, though she might take advantage of the attentions and civilities of this young man, and find it convenient that he should accompany her to different places and give her the amusement of his society, as the husband and wife were not very fond of each other's company. The acquaintance continues for nearly ten years more: yet, as far as appears, no indecent familiarity ever passed either in the presence of the husband or at all. On one occasion there was a kiss; what accidental circumstance might lead to it is not explained; but the husband resented it; he showed that he thought it too great a freedom; he appeared displeased; and no such freedom, nor any other, is ever again repeated. It is said that their intimacy was the talk among the neighbours and servants; and such scandal often exists without any just foundation—often, at all events, without the husband hearing or suspecting his own dishonour; but it is not suggested that any servant or friend hinted to the husband that such reports existed; still less that any facts had taken place which should require his vigilance.

I have already noticed that, to amount to connivance so as to bar the husband, there must be circumstances fixing upon him “intentional concurrence.” To show the degree of proof required by these Courts before such baseness can be imputed to a husband, and before such a heavy grievance can be inflicted upon him, as that of remaining fixed with an adulterous wife, I will state the judgments given in two or three cases in which the point has arisen. In *Moorsom v. Moorsom*, as already mentioned, the connivance was pleaded and an allegation admitted. The following is the sentence, at the final hearing upon the evidence.

[The Court here read a note of that judgment. Vide *infra*.]

In my opinion the circumstances in that case were infinitely stronger than those imputed to Mr. Rogers: yet the Court would not venture to refuse a separation, by pronouncing that there was intentional consent. I may add that no Judge was more alive to any misconduct on the part of the husband than the eminent individual who then presided in the Consistory Court, but he was also cautious in administering justice according to law. In *Crewe v. Crewe*, adultery was charged: the connivance was not pleaded: the wife did not give any defensive plea, nor even cross-examine the witnesses; there was much the appearance of collusion: and that as well as connivance were suggested in argument. The judge made several difficulties and postponed the decision before he finally pronounced sentence.

[The Court read a note of the Judgment in *Crewe v. Crewe*. Vide *infra*.]

In this case, again, the circumstances are infinitely stronger than those laid in the present allegation: in the latter, the adultery was notoriously going on for four years together; and, in both, during cohabitation. In the present case no adultery is charged nor admitted till after the separation. To support such a case as the present, where no adultery is charged nor admitted during cohabitation, it would require the clearest possible evidence of intention and consent. There is some doubt, whether connivance at adultery during cohabitation would be even a bar, in point of law, against a suit for adultery with a different person, long subsequent to separation. I say that there is a doubt, on the authority of my predecessor in the case of *Hodges v. Hodges*, (*infra*).

In this present case during cohabitation there was no adultery; no—

not even any indecent familiarity. I do not say, that if, during cohabitation, connivance at actual adultery, proximate acts, or even at such gross familiarity as necessarily inferred consent and intention to prostitute his wife, were clearly established, that the husband could not obtain relief because the wife continued, or even commenced, an adulterous intercourse with the same person after separation; that would be a case different from that of *Hodges v. Hodges*, but in the present case, my opinion is, that the facts are not sufficient to fix any connivance. No defence is offered to the charge of adultery: it is not admitted in her plea, unless, as I have said, it is intended to be admitted by insinuation in the articles respecting the separate beds, and the subsequent pregnancy and birth of a child: but this is so ambiguous that the Court cannot rely on it. The adultery must be proved. If the husband fails in the proof the wife will be entitled to her dismissal: but if the adultery be proved, then all the circumstances laid in this allegation would not, if they also were proved, establish connivance, and therefore would be no legal bar to a sentence of separation. Whether such a husband, morose, severe, inattentive, negligent, should be entitled to a special "legislative" interference, dissolving the marriage and enabling him to marry again, is quite a different question and rests upon very different principles; but his conduct does not amount to a legal bar to a sentence *à mensâ et toro*: and therefore, on the grounds stated, thinking the Chancellor of London did right to reject the allegation, I pronounce against the appeal, and remit the cause. 34.49  
472.3

On the 17th of July, 1830, the cause came on in the Consistory Court upon the proofs in support of the libel: when, after briefly advertng to the evidence, the Court signed the sentence of separation.

*Note.*—As there are no cases in print in which the doctrine of Connivance has been the subject of much consideration and discussion, and as the Court of Arches, in the Judgment of *Rogers v. Rogers*, particular referred to several manuscript Judgments, some cases, illustrative of the principle, are here appended.

### RIX v. RIX.—p. 74.

#### *On Appeal.*

On proof, either directly or presumptively, of the wife's adultery, great inattention on the part of the husband will not bar him. To establish such a defence, he must have been privy to her guilt, or have led her into the crime.

This was a suit brought by the husband against the wife by reason of her adultery, and on the 4th session of Michaelmas Term, 1776, Dr. John Bettesworth, the Judge of the Consistory Court of London, pronounced that the husband had failed in proof of his libel. There had been no action at Common Law, and the wife had not given in an allegation. From this sentence the husband appealed.

#### JUDGMENT.

SIR GEORGE HAY.

It is clear that there has been a criminal conversation between the

parties. If the fact is proved, either directly or presumptively, which is the general case—the Court is bound to grant its sentence. Ocular proof is seldom expected: but the proof should be strict, satisfactory, and conclusive. Keeping company with a stranger privately as Mrs. Rix did, there arises from such clandestinity the strongest presumption: and where there are to that clandestinity, additional circumstances in proof, the Court can have no doubt. A single witness with circumstances is sufficient in cases of this kind. The man was frequently alone in the lady's bed-chamber; this is a very strong circumstance of criminality: he was more than once seen on her bed: and the witness heard them there conversing after the family were gone to bed. The law presumes what passed, though the witness has declined to mention it. There is evidence of those *indicia* which in law are proofs,—marks of two persons in the bed. The witness says, “she has no doubt of the criminal conversation.” I cannot find a doubt with respect to the circumstances at Newport. This being the case, superfluous proof is unnecessary.

-4. The difficulty is with respect to the supposed connivance, approbation, and privity of Mr. Rix. If there is a connivance on the part of the man, there is no right to a compensation from the adulterer; nor could the husband obtain a sentence here, though the adultery should be fully proved. This was the case of Mrs. Cibber. (See a notice of this case in *Hodges v. Hodges*, infra.) Nottage swears, that Rix was a stranger to the journey to Newport. The servant boy gives ground of suspicion by saying, “that he believes Mr. Rix knew of it;” and assigns as a reason, “his lying there the night before.” Rix and this man were acquainted. The boy swears the husband sometimes knew of this man lying in the house: but is it an inference from thence that he was acquainted with his views? The evidence is directly the contrary. There has been, I think, a great inattention in the husband to his family: but is a Court of Justice, on a suspicion of the husband's inattention to suppose him accessory to the turpitude of his wife?

It would have been better if a suit had been brought against the adulterer at common law: but it would be going too far for me to pronounce, upon a supposition of connivance, without any evidence of the husband's knowledge. The clandestinity as well shows that Rix was not privy, as it shows what were the views of the paramour. But, whether privy or not, there is no proof that he was. Inattention is not sufficient. I cannot presume privity without proof. If a wife is led into the crime by the husband there is no pretence for a sentence on his side. There is full proof of the wife's criminality; and not the least ground to suspect the husband's connivance. I am of opinion that the sentence below is not justified by the proof.

9. 43.2.

#### TIMMINGS v. TIMMINGS.—p. 76.

Great facility in condonation of adultery with A., taking no notice of adultery with B., (of which he could not be ignorant) conduct amounting to an invitation to adultery with C.—not merely to giving free scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt; matrimonial cohabitation, after being in possession of full legal proof of such adultery, are criminal connivance and collusion, barring the husband of relief for his wife's adultery, all happening within two years after marriage.



In a suit for separation by reason of the wife's adultery, the husband must prove his case so that his own evidence shall not create a bar, by reason of connivance or compensatio criminum—for of such evidence the wife is entitled to the full benefit.

A facility of condonation of adultery on the part of the husband, leads to the inference that he does not duly estimate the injury, and will induce the Court to look with jealousy at his subsequent conduct.

Conduct amounting to an invitation to adultery, and not merely to giving scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt, is legal prostitution.

The wife having committed adultery on the first of three successive nights, and the husband, aware, and having full proof of this, sleeping with her on the second, condones thereby the previous adultery, and cannot take advantage of further adultery on the third night.

*Semble*, that the husband, by pleading that the wife slept at his house on the night after the last act of adultery charged, (of which adultery he was at the time informed,) takes on himself the onus of showing that they did not sleep together on that night—though, generally speaking, the party relying on condonation, as a bar, should plead it.

THIS was a prosecution instituted by the husband against his wife for a separation by reason of adultery. The marriage in 1789 was confessed and proved.

*Dr. Nicholl* and *Dr. Swabey* for the husband.

*Dr. Laurence* and *Dr. Crespiigny* contra.

JUDGMENT.

SIR WILLIAM SCOTT (Lord Stowell.)

In cases of this nature it is incumbent on the husband to make such strict proof of the fact charged as shall not involve himself or create a legal bar; for if, by evidence which he brings to establish adultery, he at the same time involves and implicates himself, the wife has the full benefit of this evidence, nor can he avail himself of a case in which he does not appear with clean hands.

The parties married in February, 1789. The two earliest acts of adultery are stated in the libel to have happened within the first year; the first at a house of ill fame; the other at the warehouse of the paramour. The only evidence of these are the confessions of the delinquent wife in the presence of her family and of the paramour. In what way the husband discovered or became possessed of this information there is no evidence: it is a desideratum in this cause throughout.

It has been said truly that on confession *alone* the Court will not build a sentence of separation, (see *Williams v. Williams*, 1 Consistory Reports, 304; *Mortimer v. Mortimer*, 2 *ibid.* 315; *Crewe v. Crewe*, *infra*.) but although by the rules of law a confession does not satisfy the mind of the Judge, it must satisfy the mind of the husband, particularly when direct and unequivocal, as in the present instance. And what is his behaviour upon it? His mother, in an interrogatory says, "he wished his wife to go from him—but on the intercession of friends he consented to live with her." This then is a direct condonation; and on these facts, even if supported by evidence no sentence could be built.

★ But the facility manifested in this condonation will make the Court attentive to his conduct. A husband, if the matter is not divulged, may from tenderness to his family, to himself, or to his wife, be induced not to complain to a Court of Justice—upon *strong reasons* to believe the repentance of his wife. But here were no strong inducements; the affair is passed over slightly. This part of the case is extremely barren of all information, except that he did consent to live with her again.

★ This fact will lead me to watch his conduct, because to me he appears not to estimate the injury as he ought.

The next act is with a second person, and it is pleaded that she re-

newed her acquaintance with him, whom as well as the other paramour, she had known before marriage, that they several times committed adultery, and one day in November went together to a house of ill fame. Another act is laid at the husband's house, on 16th December 1790, in his absence. The account of the maid servant Gibbs, shows a strong habit of criminal intimacy between these persons. She was the carrier of notes and messages between them. She says, he very frequently came to her house; and, excepting twice, in the husband's absence. The wife told Gibbs that he would take care of her if she and her husband should part, and that he had been her sweetheart before marriage. Gibbs also speaks to familiarities and other circumstances which leave no doubt of a criminal intercourse between those parties at the husband's house.

239. But a fact deposed to by another witness is decisive:—she plainly saw, from the street, an act of adultery between these parties, the window shutter being scarcely closed. The Court cannot abstain from remarking how slight the caution and how little the reserve, observed upon this occasion, in order to keep her conduct from the knowledge of her husband. Usually, indeed, a husband is the last man acquainted with his own dishonour, as in general, caution and secrecy are observed. But where a criminal correspondence is carried on in this open and shameless manner, when the fact is absolutely done "*in trivis*," it cannot be supposed to have been altogether unknown to him. The only evidence however is, that he had acquired a knowledge of it by the end of January 1791. His mother, indeed, knew it on the 12th of January; and it is most highly improbable to have travelled to the knowledge of the mother (whom he appears to have consulted on other occasions) without arriving also to the knowledge of the son. I cannot force my mind to the belief that he was the only person unacquainted with this matter: but it is the defect of this cause throughout, that it does not appear when or how he first received information of the different facts.

However the most material charges are with Smith. And how is this affair stated in the libel, and how does it come out in the evidence? In the libel it is stated—"that Smith was received as an acquaintance in Timmings' house; but in the latter end of 1790, Timmings, becoming dissatisfied with his conduct, remonstrated with him and forbad him the house, and his wife to receive him; notwithstanding which she frequently received his visits unknown to the husband; and in the evenings of the 10th and 12th of January she did so and committed adultery with him."

Now the very contrary appears in evidence. He spoke to Gibbs about these visits six weeks before the 10th of January, but there is no proof that he took any steps to prevent them.

197. Two facts of adultery are pleaded—one in the 12th, the other in the 13th article. I shall take the 13th first, which is—that in the afternoon of the 12th January 1791, Timmings went to Greenwich, and his wife having given Smith intelligence of his absence, invited him to supper. The first witness, Gillett, does prove an act of adultery on this evening, as laid in the libel. I cannot help observing that this witness by the manner he states his evidence, leads me to suspect that something has been intentionally kept from the Court: he says, by communication from Gibbs, he suspected all was not going on right and he determined to watch their conduct; and, for this purpose bored holes; he states no previous knowledge of his own; only suspicions; and he is not produced

to speak to the 12th article. Now when I look into the depositions of the other witness, Montford, I see Gillett was on the spot, and had the same opportunity of ascertaining by positive proof the whole business on the night of the 10th of January.

Montford says, that on the 10th, Gillett came to him, as he understood by his master's order, and desired him to go with him to watch the conduct of Mrs. Timmings and Smith; and that they arrived together at the house between eight and nine o'clock. Gillett then, having been also sent to observe the criminal facts that passed on that occasion, why was he not produced to speak to them? I can see no good reason: and the Court cannot help feeling for the circumstance of having evidence denied it which the case properly afforded. Montford says, that on the 10th, whether Mr. Timmings was apprised or not he does not know, but when he went he saw him in the warehouse. Can I possibly suppose him to have been a total stranger to the scene which was going on? but from the evidence of Gibbs, I find he not only knew of it, but was active and, as I think, illegally active in it.

It must be remembered that the husband has pleaded in the libel that he had forbidden Smith his house; yet Gibbs says, there was scarce an evening in which Smith did not come to the house. But what happened on the evening of the 10th of January? Smith, in the wife's absence, drinks tea with Timmings, and on her return, sups with them. The husband then goes out and leaves them together for some time, during which they commit adultery: he returns, and they continue all together some time after. Is this proper conduct towards a man of whom he entertained strong suspicions, and whom he had forbidden his house?

True it is, that a husband is not barred by a mere permission of opportunity for adultery; nor is it every degree of inattention on his part which will deprive him of relief; but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of the wife take its full scope: but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution. The analogy, as to theft, in the passage cited from Sanchez, shews this doctrine: (a) and it was solidly established in a case determined in the Arches, on the last session, (b) and in all cases of this kind.

(a) "*Viro suspicanti adulterium uxoris licitum est illam observare, cum testibus, idoneis, ut eam possit de adulterio convincere. Quoniam id non est ejus peccato connivere, sed uti ejus malitia ad proprium commodum. Secundo, quia aliud est rogare, consulere, vel jubere malum, quod nunquam licet, et aliud permittere seu non auferre mali occasionem, quod aliquando licet ob aliquod majus bonum. Nimirum non peccare parentes vel heros qui filiis vel famulis non auferunt aliquam furandi occasionem cum eos ad furandum propensos norunt, ut sic in furto deprehensi resipiscant*"—Sanchez de Matrimonio, Lib. 10. Disp. 12. No. 52.

(b) The case referred to was a suit for separation by reason of the wife's adultery with a servant. In February, 1791, the man was discharged by the husband; for what reason did not appear. There was nothing to show that the husband suspected any thing till the 10th of April, when a servant told his master of his suspicions: the husband set three witnesses to watch the man's lodgings in the neighbourhood. On the 18th, 22d, and 25th April, two of these witnesses there saw what left in their minds no doubt of adultery. On the 25th, it was agreed she should be exposed, and the room was immediately entered.

The Court—Sir W. Wynne—said, that "the only remark that arose on the man's dismissal was, that the husband could not be charged with laying a trap for his wife; if he had wished to do that, he would have continued him: that up to that time the facts proved no act of adultery, but a criminal inclination in the strongest degree: that in its apprehension the case came

But the matter does not stand there. The doctrine laid down might apply if the husband had broken in on their criminal pleasures, and had said, I only availed myself of that opportunity to obtain full and complete evidence. But how did he comport himself the day after, on the spot, in the neighbourhood, and when apprised of her guilt? This does not rest on presumption; it is proved by the evidence of Montford; that he had full information of what passed between them. At this time, supposing it perfectly lawful to have used means to obtain the discovery, what use did he make of it? For if he is once in possession of a fact of adultery, and still continues his cohabitation, it proves connivance, collusion and facility. Did he apply to the law?

On the 12th another fact happened, to which a great deal of evidence applies, showing I think that he was well apprised of the intended interview; and that he was posted there at nine o'clock. But, if the husband here stood clear, his conduct on the 11th would have defeated him of his remedy. He cohabited with his wife that night, it is agreed; and he is not to avail himself of this subsequent discovery, having remitted the other. It has been said, there is no condonation of this fact in proof, nor any thing to show that he slept with her on the night of the 12th; and that if condonation is relied upon it should be put in plea, for that it is not incumbent upon the complaining party to prove there was no condonation. (See *Durant v. Durant*, Vol. I. p. 733, 751. 3 Eng. Eccl. Rep. 231, 310.)

To this as a general doctrine I assent; but I think in this case, where it is alleged in the Libel that she did not leave his house till the 13th, it is necessary the complainant should show that they did not cohabit on the 12th by sleeping together: he has taken an onus upon him, which, in ordinary cases, does not lie on the complaining party.

There is another circumstance strong to the disadvantage of Timmings. Gibbs, the profligate instrument of the wife—the active go-between in all her criminal transactions,—still lives in his service, and, as appears by an Interrogatory, in full as great a state of familiarity as is necessary between a servant and her master.

On the whole, the husband is criminally implicated in these facts. Corrupt as she has been, he is equally corrupt; he encouraged her guilt by criminal connivance and collusion. Such a man is not the object of the attention of the law. I dismiss her,—not because the husband has not proved her guilt,—but because he has proved himself utterly unworthy of legal relief.

strictly within the authority of Eliot and Eliot,\* where the parties went to a house of ill fame together. Here was a bed-room let to a man who had been her menial servant, and with whom she had before been shown to have been too familiar; and the lady went backwards and forwards to it, and was locked up there with him, and permitted him to take gross liberties with her person, and other familiarities. That on the whole there was a complete and legal proof of criminality, and that the husband was entitled to a separation."

*Note.*—The above summary is taken from a long manuscript note, which does not notice the point referred to in the text as established by the facts of the case.

\* *Archives*, 1776. See 1 Consistory Rep. 302. (4 Eng. Eccl. Rep. 416.)

## LOVERING v. LOVERING.—p. 85. 43, 2.

Where the wife made no defence to a suit for divorce by reason of her adultery, the Court dismissed the suit, on the ground that the husband, having connived at his wife's adultery with A. could not complain of an adultery, nearly cotemporary, with B.

THIS was a suit of adultery brought by the husband against the wife, and was heard *ex parte*.

## JUDGMENT.

SIR WILLIAM SCOTT. (LORD STOWELL.)

No appearance, no plea, no interrogatory has been given on the part of the wife. Very few witnesses have been examined. The Court is left with as bare information as possible. However, there is absolute proof of adultery, and a course of shameless profligacy. The wife had a strong attachment to the apprentice, which she took no pains to conceal; it was known and talked of in the family: her bell used to ring for him ten times a day: it was a common joke in the workshop where the brother of the plaintiff was present: he did not imagine her guilty, though other witnesses speak of their behaviour as leading to a different conclusion. It is by no means probable that this partiality should remain an entire secret from the husband: there was a forwardness, as if this woman wished to obtrude it on notice; but the case does not rest on probabilities; for in the libel the husband states, that in May 1790, he had himself observed great and indecent familiarities between his wife and this apprentice.

It is said, that the husband might forgive; and yet has a right to avail himself of further misconduct. The husband may be induced to remit on many grounds,—from motives of compassion—remains of tenderness—remembrance of past endearments—regard for common offspring: he may, on such grounds,—on promise of amendment and reasonable prospect of it—forgive. But there was no such promise here; he says, “he did not forgive; but withdrew himself from her bed.”

Condonation and connivance are very different: and I must look a little at his conduct to see whether it can be set down to legal connivance. There is one circumstance here which distinguishes this husband's conduct from proper condonation, and marks an improper consent. If he were induced to forgive his wife, yet when he sees an indecent familiarity with his own apprentice, would he suffer the man to remain one moment in his house? This is impossible to reconcile with a due care of his own honour. If he had pardoned his wife after 1790, and discharged his servant, there would have been nothing in the condonation. The act of his permitting him to continue in his house, after he knew of great and indecent familiarities, and till she is guilty with another, amounts almost to consent; and is a degree of delinquency which renders him unworthy of a remedy as far as that man is concerned. The husband pleads, that he left the bed of his wife: his own witnesses prove the contrary: they prove, that he slept with his wife a few days before the separation, after knowing of all these indecencies. I have a right to presume that the husband was not ignorant or averse to the sort of intercourse that was going on. There is however proved criminality with another man, nearly cotemporary.

The case then comes almost to this. Can a man, consenting to adultery with A., but not consenting to adultery with B., take advantage of that adultery, and say to the Ecclesiastical Court—"non omnibus dormio." This is language not to be endured. The Ecclesiastical Court requires two things,—that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife: and if he has relaxed with one man he has no right to complain of another. I think, in this case, the husband is not entitled to relief, having consented to the turpitude of his wife. I dismiss the suit.

• MOORSOM v. MOORSOM.—p. 87.

The notoriously debauched character of the paramour, his exclusion from all respectable female society, the introduction of him by the husband to his wife, the encouragement of their intimacy, the allowing her to accept a supply of money from him, expostulations from her family at such intimacy, the refusal of the husband to attend to them, and improper familiarities and liberties in his presence, and without his remonstrance, are material facts in a plea of connivance.

In a suit for separation by reason of the wife's adultery, connivance, on the part of the husband, may be pleaded by the wife, consistently with a denial of her guilt.

Indifference, ill-behaviour, or cruelty, is not pleadable, in answer to a charge of adultery, nor relevant to a plea of connivance.

As a plea of connivance must generally be circumstantial, and consist of many facts, trifling when taken separately, but altogether convincing, the Court must allow a latitude in such a defence.

It is not necessary to show connivance at actual adultery. The Court, from connivance at improper familiarity, will infer corrupt intent as to the result.

Much delay having occurred in the wife's defence, a plea of minute facts to establish connivance having been admitted, and the cause now standing "to propound all facts," an allegation of the wife, not responsive, but pleading more minutely, but to the same effect as in the former plea, rejected in toto; the facts not being noviter perventa.

The whole substantive case of a party should be at once brought before the Court; but where it is clearly shown that the facts could not have been sooner pleaded, additional articles may be given in.

To establish connivance as a bar, it is not sufficient that the man did not act as a wise, or prudent, or attentive man, nor that he in fact contributed to his wife's guilt: he must be shown, intentionally, to contribute thereto: there must be intentional permission or corrupt facility.

Connivance of a passive and permissive kind, is to be proved by a train of conduct and circumstances.

Passive connivance is as much a bar as active conspiracy, but there must be an intention that guilt should ensue.

A LIBEL, pleading adultery in the wife, having been admitted to proof, a defensive allegation was given in, which,—after reciting that part of the libel which alleged that the wife left her husband's house without his knowledge, and went off with C.—pleaded 1st, [coolness and cruelty on the husband's part; that she late in the evening and when it was dark quitted the house with her husband's knowledge, and with the intent to go to her father's; that though the husband saw her going, he did not prevent, nor accompany her, nor send a servant with her; and that since she quitted she has been living with her father.]

[2d. That Moorsom had become less attentive since his marriage; and did not attend his wife to parties; but allowed C. to accompany her.]

3d. That C. was gay, lewd, and debauched, and his general character so notorious, that no married man in his neighbourhood would permit him to visit or associate with the females of his family; that his charac-

ter was well known to M. long before and since his marriage, that M. introduced him to his wife, to whom he was a perfect stranger, that at his house he would make excuse for absenting himself and leaving them alone together for a long period; that finding them together on his return, he would express no displeasure; that he encouraged him to continue his visits, and permitted his wife to accompany him to assemblies, and to dance with him there, and to go out in his carriage with him, [and that she received from him presents of fruit and game directed to her.]

4th. That M. paid no attention to the remonstrances of his friends, who forewarned him of the probable consequences of this intimacy; that he continued to connive at it; that his wife's parents repeatedly told him, "they feared their daughter's reputation would suffer in the eyes of the world from his countenancing the visits of C. who was known to be a man of gallantry and intrigue, and of very loose and abandoned character, and that his neighbours were very much astonished thereat, and made many remarks upon his suffering the same;" that he generally replied, very much out of temper, "that he would not affront his best customer, by desiring him to make his visits less frequent, or putting any restraint upon the conduct of his wife towards him." That notwithstanding such remonstrances he still continued to countenance and permit C. to visit and keep company with his wife, though M. seldom or never returned the visits or appeared on habits of intimacy with him.

5th. That C. would sit close with his arms round the waist of Mrs. M. while at the harpsichord, and put himself into amorous attitudes with, and kiss and toy with her, and use other modes of dalliance, and take very great and unbecoming liberties with her; that M. though present, or at other times surprising them in such situations, did not remonstrate with C. or rebuke his wife.

6th. [That from the insufficiency of her allowance for her private expenses, she was necessarily and continually incurring bills, and under the necessity of applying to various persons for money to discharge them, and] from time to time did accept of, and was liberally supplied with, money and other presents from C. which was well known to, and permitted by her husband.(a)

Dr. Nicholl, in objection.

The Court, in a suit of this nature, looks with jealousy on the pleas of the wife, because it is her interest to keep the cause open: for alimony is received by her while the cause lasts, and she is in no danger of expense. Of the various sorts of defence, as recrimination, malicious desertion, condonation, and the like, connivance is the least favourable, because it is a tacit acknowledgment of guilt, and therefore cannot be set up together with an exculpatory plea. The libel pleads a verdict with damages 3500*l.*: this is no proof of the *wife's* guilt, but a defence of connivance is most commonly used in an action against the adulterer. If the fact be so, it is not to be supposed but it would have been set up as a defence to the action: I do not argue that this is a proof that there has not been connivance, or that because it was not set up by the adulterer, the wife is barred from such a plea, but the Court will be induced to observe it narrowly, and not to admit any thing not so strictly laid as to bar a sentence. (The objections taken to the 1st, 2nd, and 6th arti-

(a) The parts of the plea printed in brackets were not admitted.

cles were to the same effect as appear in the Court's sentence.) C.'s character was its own antidote, and every woman of virtue, as Moorsom at that time supposed his wife, would have been put on her guard by it. His answer to her mother's remonstrances amounted to no more than an expression of confidence in his wife, or might be made to prevent a plan for his discovery being interrupted by premature interference. Of the facts pleaded in the fifth article there is no specification of time; no person is alleged to be present—how are they to be proved? No remonstrance from her to her husband, or to her own friends, respecting his inattention is pleaded. The whole of the facts are too slight to operate as a defence. If a husband is suspicious of his wife, the conduct which he follows, in order to detect her guilt, wears necessarily the appearance of connivance.

*Dr. Battine and Dr. Laurence, contra.*

*Per Curiam.*

This is a defensive allegation brought in by the wife in a prosecution for her adultery. This defence comes in a late period. The circumstances, however, explain the reason; but if I admit it, I shall expect diligence in the proof. A negative issue was at first given to the libel, pleading an elopement from the residence of the husband, to London and different places, at each of which it laid facts of adultery.

This allegation in part pleads connivance; and it has been said, that such a plea is not consistent with a denial of facts; but I think it possible that a denial may be given, and yet connivance be pleaded at the same time. Undoubtedly, if the wife admit in one part of the defence a fact, or even a proximate act of adultery, it is not open to her to say in another part that she is not guilty; but it is competent to her to say, there may have been suspicious appearances, though I deny criminality, and those appearances into which I have been betrayed have occurred by the contrivance of my husband, or have been produced by an insidious project on his part; but I have not completed his intention: as, in a case of recrimination, the party may deny her own guilt, but at the same time say, that even if she had been guilty, yet the conduct of her husband was a bar to his prayer.

It is said, that a verdict having been given with such large damages, the Court will regard the plea of connivance with jealousy, as this defence was not set up at common law, or at least not established. The eternal answer is, a verdict is "*res inter alios acta*." (a) Whatever defence the adulterer set up, or declined, is nothing to the wife. It will not conclude her. On what facts the jury determined, whether the circumstances of connivance were brought forward, is out of the view of this Court. The wife's defence must be independent of that, though the fact may a little awaken the jealousy of the Court: but it will do no more. She avers the facts of the allegation to be true, and so at present they must be taken to be.

This allegation is of two parts—the one, pleading connivance; the other, miscellaneous matter. This latter part is open to the objections made by counsel. The first article negatives none of the material facts in the libel. That she quitted him from his coolness, is no justification. Indifference, ill behaviour, or cruelty is not pleadable in a suit for adul-

(a) Vide infra 37, and *Hoar v. Hoar*, infra. Also, upon this subject, see *Elwes v. Elwes*, 1 Consistory Reports, 289, in notis. (4 Eng. Eccl. Rep. 401.) *Loveden v. Loveden*, 2 ibid. 51. (4 Eng. Eccl. Rep. 461.)



tery. It will not justify her criminal misconduct. The only fact negatived is, that she quitted him without his knowledge; and it is now pleaded that she quitted him with the intention of going to her father's, and that he did not oppose it nor accompany her. This will not affect his claim for relief. If he did not attend her, it may be incivility or not, according to his circumstances. It pleads she has since lived with her father; but it does not say, that she went there directly, nor has continued there ever since; nor does it appear how soon her intention was diverted; on this there is an entire silence. The fact negatived is immaterial, and I shall not put the husband to the expense of a contradiction by plea.

The second article is also immaterial; it pleads that he was a more attentive and polite lover than husband; that he did not attend her to places of amusement. That a tradesman should so attend his wife, is not perhaps much to be expected. The fact of his allowing her to go with C. appears sufficiently in another article. I therefore reject the two first articles.

The sixth article is also liable to objections. The parsimony of the husband depends on his discretion and circumstances, and the Court cannot take on itself to judge in such matters. That she accepted money and presents from C. is of importance, but it may be added to the third article. It would be a striking circumstance if he knew she was in the habit of receiving money from this man. As to his allowance to her for pocket-money, I cannot inquire into it; and but little advantage could be drawn from it, if I knew it. It is sufficient that with his consent she was supplied with money by C. I therefore direct this fact to be added to the third, and reject the remainder of the sixth article.

A plea of connivance must for the most part, in its own nature, be circumstantial, and consist of many facts, trifling perhaps when taken separately, but altogether making a case calculated to affect the judgment of the Court. That the husband entertains such a design must be a matter of inference, for it can hardly be supposed that a man, who frames a project of the kind against the honour of his wife, will avow it, or betray his purpose by any single broad unequivocal act. The Court then must admit a latitude in such a defence.

The third article pleads very material facts. If the husband is so very imprudent as to recommend to the society of his wife a man excluded by others, it goes further than carelessness, and lays a foundation for the belief of the design imputed. If the husband had such a design, he would not introduce a virtuous man as his accomplice, but just such an one as C. It has been said, that C.'s character was the antidote; in the same way it might be said, that if he had carried her to a brothel, and told her the character of the house, it was a sufficient caution. He should remember the dangers of seduction, and the infirmities of human nature; and it is his duty to give to his wife the benefit of his prudence and protection: his practice of leaving her alone with a man of such a character, is not to be explained upon the ground of a virtuous and proper confidence; nor his permitting him to conduct her to, or dance with her at assemblies, without expressing displeasure: this and the other behaviour is not justifiable on the part of the husband; it may lead to that interpretation on which the wife relies. The conclusion of this article is slight, "that she received from him presents of fruit and game."

This stands on a different ground from the supply of money. Presents of fruit and game are not of the same import: they pass as common acts of civility.

The fourth is extremely stringent. Her family taking alarm at the intimacy, and his refusal to attend to their remonstrances on the impropriety of her conduct, go a great way to impress a suspicion of his criminal design; and to show connivance. It is argued, that his refusal may be no more than an expression of confidence in the virtue of his wife, or that he might wish for an opportunity of discovery. If he had shown alarm and said, I will avail myself of your communications and watch her conduct,"—this might be a sufficient answer; but if, on the contrary, he said—what is here laid—"that he would not affront his best customer by laying a restriction on his wife's conduct,"—this is most important.

The fifth, it is said, will be difficult of proof: but there is undoubtedly a possibility of proof: and if it can be shown that improper familiarities from a very debauched man passed in his actual sight, without his interference, it would give reason to believe, that the husband was not averse to greater familiarity: but I shall defer delivering judgment on their effect till I see how they turn out in proof.

It is not necessary to prove connivance to actual adultery, any more than it is necessary on the other side to prove an actual and specific fact of adultery. If a system of connivance at the improper familiarity, almost amounting to proximate acts, be established, I shall infer a corrupt intention as to the result, and shall not call for more direct proof.

A responsive allegation on the part of the husband, admitted without opposition, in substance pleaded,—1st. That C. was visited by all respectable people; was married and had four children; that he was looked upon as a man of honour; was a man of pleasing manners and conversation; had parties at his house which were attended by ladies of good character, and that other ladies, besides Mrs. M. accompanied him in his carriage; that M. was very domestic, seldom from his wife, except on business; was a tender and indulgent husband, that her brother was a great friend of C.; and another brother, a great friend of C.'s son; that C. was forty, and a good customer to M.; that M. sometimes went to the assemblies with his wife, and at all other times sat up till her return; that she always went in a chair, and had a servant to attend her; that C. presided at the assemblies, walked out and danced with other ladies.

2d. That C. and Moorsom were on terms of great intimacy and friendship, and Moorsom constantly returned his visits.

On the first Session of Easter Term, 1793, a further defensive allegation on the part of the wife was given, consisting of two articles; and pleading, more minutely and circumstantially, acts of undue familiarity and improper assiduity on the part of C., in the presence, or to the knowledge of, Moorsom: and also that the conduct of the three parties was matter of general notoriety, observation, and conversation.

The admission of this allegation was opposed.

*Per Curiam.*

In this case the libel was admitted on the 3d Session of Trinity Term, 1791. No answer was given till the second Session of Michaelmas

**Term:** on the first Session of Easter Term, 1792, publication was prayed, and to propound all facts: and on the second Session an allegation was asserted for the wife; it was not debated till the third Session of Trinity Term, and was admitted on the fourth. That allegation pleaded many circumstances composing the defence of the wife—to the effect that her conduct was occasioned by the corrupt encouragement of her husband. She did not thereby admit the fact of adultery, for she gave a negative issue; she only asserted that, if the fact had been true, the husband, under such circumstances, was not entitled to a divorce. That allegation was very minute and particular, and on that ground parts of it were rejected. The rejoining allegation by the husband was not debated. A commission for the examination of witnesses has been returned. The cause stands “to propound all facts,” and now another allegation of the wife is brought in, not responsive to the husband’s allegation, but pleading circumstances, some almost the same as those in her former plea, others of the same nature. It is the duty of the Court to compel parties to bring the whole of their substantive case before the Court at once, where it is possible, which is not always the case; for the knowledge of facts, or the proof by which the facts are to be supported, may not always be in the power of the party, and then additional articles may be given in; but it must clearly appear to the Court, that they could not have been given in before: a contrary practice would be extremely oppressive, especially where one party pays all the expenses on both sides.

It is said, that the facts pleaded generally in the former plea are more specifically and circumstantially stated here. This is of itself an objection. If the party is to plead facts, then to split and make them minute, where will the matter end? When a party states facts, he ought to be required to state the circumstances, and is not to be allowed to state them separately. The wife had a year to consider of and prepare her defence. The facts, which almost every one happened to herself and in her own presence, must have been known to her; and she had abundant opportunities for making all necessary inquiries as to—and, from the nature of the facts pleaded, she must have known—the means of proving them. If, being in possession of the facts, she did not prepare her defence, the husband is not to bear the inconvenience.

They pleaded, in the first allegation, that C. often went out in the chaise with Mrs. Moorsom: here they plead, that when Moorsom was with them in the chaise familiarities passed; and that Moorsom used to get out, leaving them in the chaise alone together. Now of this fact the wife must have been in possession: and as to the excuse, that inquiries were not made with success for the evidence necessary to establish it, this, considering the great stake at issue, was great negligence, from the effect of which the Court cannot relieve her. They might have stated this in the former articles. The same observation applies to the other familiarities, those at the assembly for instance: they had before pleaded that C. accompanied her to, and danced with her at, assemblies; and now they plead Moorsom’s conduct after: that after C. had danced with her, they would all three retire into a private room, where Moorsom left them together. This was not secret; it might have been proved by many persons: the party must have known the fact, and that she could prove it.

Some of the circumstances are such as would come out under the  
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articles of the former allegation, and in that allegation more general words might have been added. The objection to the former was, that it was too particular. The second article pleads, that Moorsom's conduct was matter of notoriety in the town: she must have known of the existence of this, and of the means of proof, at the time of giving in the former allegation; for that a matter of such universal publicity should be a secret to the party before is incredible. Then as to the remonstrance from Moorsom's mother to C.'s mother on this intimacy, it is not pleaded that the husband was privy to it; if it could affect him, they might have pleaded it before, when they alleged that the familiarities were observed by the friends, and that remonstrances were made; but the fact is insignificant: considering that the effect of this allegation is to increase the stringency of her own facts, it would be very improper to admit it at this late period, for the party should bring forward the whole of her substantive defence at first, or show that she could not. The contrary is manifestly the case here. The party might before have pleaded the whole in general words. If facts are now excluded, it arises by her own negligence. On the important considerations of the injury that the admission of this allegation, by increasing delay and expenses, will inflict on the husband's character and fortune, I reject it in toto.

The case now came on for the final hearing.

*Dr. Nicholl* and *Dr. Swabey* for the husband.

The libel pleads the marriage on 22d June 1785, Moorsom being then twenty-six years of age, and Mrs. Moorsom seventeen. On the 10th January 1791, she left her husband's house without his knowledge and eloped with C.; went to North Allerton; arrived there at four in the morning; she desired the chambermaid to make only one bed which was prepared in a single-bedded room; she went to bed; he went up; door was locked; parties slept together. Next day went to Grantham; slept together: on 15th January, arrived in London, stayed a week there passing for and cohabiting as man and wife. Verdict, damages 3500*l*. Ten witnesses; marriage confessed; exhibit proved.

1st Witness—a friend of C. who borrowed from him clothes and a trunk—saw Mrs. M. in chaise; came to prevail on C. to leave her, and return to his wife; placed Mrs. M. under care of a brother-in-law. 2nd, Driver of chaise knew both parties; drove them to North Allerton. 3rd, The chambermaid at North Allerton proves arrival, sleeping together; did not know them; told by post boy—not husband and wife. 4th, The chambermaid at Grantham proves their sleeping together; positive as to identity; gives no reason, but explained by the attorney of Moorsom, who showed C. and Mrs. M. to the last witness, who recognized them. Three others prove their sleeping together in London, and her going by name of C.: these were examined on the trial at common law: no doubt of identity.

On responsive allegation—fifteen witnesses were examined, and on the rejoining allegation five. 1st, Mrs. M.'s mother—That C. was addicted to gallantry; believes M. must have known it; has twice seen her daughter in C.'s phaeton; daughter received a toothpick-case and knife; nothing clandestine; no evidence that he supplied her with money. Witness often expressed her surprise that C. should be so much at the house; once said "feared daughter's character would be injured." M. said, "Would you have me affront my best customer." It appears her

objection to M.'s acquaintance with C. was because the latter was expensive and of superior fortune. Mrs. M.'s custom was to spend Saturday evening with her father and mother; once was late; her excuse, that she was detained by a visit from C., and under these circumstances the objection was made. 2nd. Mrs. M.'s father proves the long acquaintance of M. with C. 3rd. A maid-servant to M.—C. often came; stayed there; M. would go out; C. drove mistress out in phaeton; made her presents of fruit, &c.; sat close to her; squeezed and kissed her hand; scraped her nails; and kissed her hand in presence of M. 3rd. A man servant to C.—danced with her; arm round her waist at harpsichord; M. sometimes reading; one evening, at parting, C. kissed her in presence of deponent and M.; gave her meat off his own plate with his fork when dining by waterside. 4th. Another maid-servant to M.—M. left them together; and went into counting-house. 5th. A third maid-servant to M.:—M. left them together; went out in phaeton together; M.'s child sometimes with them. 6th. This witness, of the age of sixty-seven, would not have trusted his wife for an hour with C.; M. might not have known his general character. 7th and 8th. Two other witnesses—went together in phaeton; walked arm in arm. 9th. A clergyman—from notoriety of C.'s character thinks it impossible but M. must have known it. 10th. Another witness—was sent with a present of peas. 11th. M.'s father—met C. coming out two days before elopement; said "too often there; was an expensive man." 12th. M.'s nursery-maid—C. came two or three times a day on business; asked first for M.; when there, M. would retire into counting-house only on business; walked out together; went together to assemblies; believes M. had no bad opinion of C., or would not have permitted this.

The ground-work of the charge on the husband is, the notoriously bad character of C., that no one with a wife or daughter would admit him into their house: but, on the rejoining plea, five witnesses of respectable character prove the facts as pleaded, that C. was held a man of honour, that there was no report of C. being forbid any house, and that M. was a tender and indulgent husband; one witness says he had no reason to suppose that M. thought C. a man of debauched character; and all depose, that they think M. was incapable of conniving at improper conduct in his wife. The only fact, referred to, appears on interrogatory, that that C. had, eighteen years before, had connexion with some woman. One gentleman deposes, that he would not have hesitated to trust his wife with C.; does not believe M. had the least suspicion of the elopement; that when M. was first told, he was so much affected that witness did not expect he would have lived; he scarcely ate or drank for two days.

This is the substance of evidence. Adultery is fully proved. The defence, containing serious accusations on the husband, is unfounded. Character of C. not such as to excite fear of any husband; his bad repute unknown to M.; an old and intimate acquaintance of M. Nothing happened which should induce him to interfere in his wife's acquaintance with a man whom he considered as a most intimate friend. What is connivance? Perhaps, from the expression in Sanchez, "*Vir qui uxorem prostituit*;" (Sanchez de Matrimonio, Lib. 10. Disp. 5, No. 3, 4.) one might be led to think it necessary that the husband should be active: but we admit that if he is passive it is sufficient; he must however be conusant and guilty. The Court will consider likewise the habits and

manners of life of the parties and of the place where they live: there is less reserve in the country and among people in a middling situation than in town, and in the superior ranks. It must be shown that he knew and wilfully lay by and permitted the crime. The intention of the husband may be proved by facts: but they must be unequivocal facts; there must be shown such familiarities and approximations as could leave no doubt, or at least must raise a suspicion in the husband.

The question is, whether such facts were known to M., as, considering the relative situation, &c. of the parties, might and did excite alarm in the husband. The charge here depends on C.'s being a man of so notorious character as to be excluded from decent houses; all that is suggested on the interrogatories is a connexion with some young woman, eighteen years before, prior to his marriage; no similar charge since. The familiarities were of a nature that would not alarm in the country, and in the situation of these parties. There was nothing clandestine; all was done openly before the servants: they were not surprised by them. There is nothing in the character of the husband leading to this suspicion: he was a domestic, tender, and indulgent husband. What inducement could there be to such a man? he was almost distracted at hearing of the elopement.

*Dr. Battine and Dr. Laurence contra.*

One clergyman had a bad opinion of C.; had heard was excluded from one house in the neighbourhood: deponent would not have admitted him if he had a wife; M. must have known his character from notoriety. Mrs. M.'s father and mother—that C. always considered as addicted to gallantry; M. must have known it as always residing in the same place. The witness of the age of sixty-seven—that C. had a general bad character as to women. Several witnesses—that no doubt M. must have known C.'s character. Another witness—that few ladies kept company with him without losing their character. Two servants—C. visited often in same day; M. retired and played on a flute: that M. finding staid several hours, showed no displeasure. One witness says, they walked together hand in hand; M. present. Presents are proved, and remonstrances are pleaded. Many parts of rejoining allegation not proved. M. was told of the elopement at an early hour, yet did not pursue. On the whole, M., when he introduced C. to his wife, knew his general character, admitted his frequent visits; familiarities and indecencies passed in his presence; he allowed her to receive presents from him; her conduct excited attention and remonstrances; he refused to interfere. Husband has no right to sentence.

The Court took time to deliberate.

JUDGMENT.

SIR WILLIAM SCOTT (Lord Stowell).

This suit is brought by Richard Moorsom against his wife for a separation by reason of her adultery. The marriage is confessed and proved. The adultery is proved and almost confessed. A negative issue has been given, but the allegation, on behalf of the wife, is not an assertion of innocence: it rests her defence on that which indirectly admits the truth of the husband's plea,—the defensive allegation charging connivance on the part of the husband.

It is not necessary to state the evidence of the adultery further than that C., the party charged to have eloped in 1791 with Mrs. Moorsom, is proved to have so done. The chaise-driver, who knows both C. and

Mrs. Moorsom, says the same. The chambermaid at the inn proves that the persons brought by him slept together in the same room: she did not know them, but is told by the post-boy that they were not husband and wife. The chambermaid at another inn proves that they slept together: she is positive as to their identity: and it appears, from the evidence of the attorney, that this witness has since seen both C. and this lady, and recognized them. Three other witnesses also speak to these parties sleeping together and going by the name of C. There is also a verdict giving 3500*l.* damages. On this evidence there is no doubt of the guilt nor of the identity.

The defence which, in law and reason, is as available to the party as the fullest contradiction of fact is—that the husband himself was the author and accomplice of the crime; that he has practised a train of conduct which led to her guilt, and which he foresaw and intended should lead to it; that he is therefore not the object of relief which the law gives to the innocent only. The conduct then upon which the wife relies for her defence is of a passive and permissive kind, to be proved therefore by circumstances. Active conspiracy appears in overt acts, but unless there are declarations to establish it, connivance must in general depend on circumstances, and is to be gathered from a train of conduct which the Court is to interpret as well as it can.

The first general and simple rule is, if a man sees what a reasonable man could not see without alarm; if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; but this is not to be too rigorously applied without making allowance for defective capacity: dulness of perception, or the like, which exclude intention, is not connivance; there must be intention. The presumption of law is against connivance; and if the facts can be accounted for without supposition of intention, the Court will incline to that construction. Undoubtedly there have been some persons who have conspired against the virtue of their wives to gain a separation, and (experience has proved) have even connived without such an object: but either of them is contrary to the usual conduct and disposition of mankind; and the Court is to presume according to general rules of conduct. However, though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy; he would be *particeps criminis*.

The expression of the books, of a man prostituting his wife, is too strong, but the rule is, "*volenti non fit injuria*;" that is the true principle: active or passive, the husband is not the object of legal relief.

The verdict giving such large damages, it is forcibly contended, rebuts the argument of connivance; for it shows, either that no such defence was attempted, or that it was not proved. It has been often observed, that a verdict to the disadvantage of the husband is strong, because he is a party to both proceedings, and therefore such a verdict will operate in other courts: but a verdict against the adulterer is slight evidence against the wife, who is no party to the action, and who has no control in the conduct of it. At the time of the trial she is often at variance with the adulterer: he may have good reasons not to set up a defence which she may sustain. The defence of connivance is hazardous where the action is for damages, for it is to be proved by circumstances, and if it should fail, it will inflame the damages. Here part of the wife's defence is, that C. is a man of debauched life; but he could not set up the

turpitude of his own character. Possibly, or probably, he was not in possession of a material part of the evidence, which has been much relied on—a conversation between the mother of Mrs. Moorsom and the husband. It was natural that she would step forward to the aid of her daughter's character, which she would not do to protect C. from high damages. On all these considerations, I am satisfied that it was impossible this defence could be submitted to the King's Bench; it was impossible that such damages could have been given on the evidence now before this Court. I shall not suffer my mind to be influenced by the damages.

The marriage of these parties was in 1785. As far as appears, there was no disparity of condition or age, no seeds of dissatisfaction; they had one child, and lived, as far as appears, on terms of general amity. The contrary is not pleaded. An interrogatory has been put,—whether he was an affectionate husband; but the witnesses are such as do not know much of the parties. This interrogatory is not put to the witnesses upon the second allegation, who might know. Mercer says, that as far as he saw, Moorsom was an affectionate husband. He pleads that he was affectionate, and the witnesses support it as far as they speak. I may therefore set off with this—that there was nothing in the general state of Moorsom's affections towards his wife, that would lay a ground of suspicion that his conduct was such as to tempt her to part with her honour, or that he would consent to her pollution with a view of getting rid of her.

The defensive allegation pleads that C. is notoriously a man of very debauched life, and of such a character, that no man of credit would suffer him to visit the females of his family; that his character, both before and after his marriage, was known to Moorsom; and that he first introduced him to his wife. As to the private morals of C., I have no curiosity nor right to inquire; but I have a right to inquire into his character, because it involves the intentions of others; and I am compelled to say, that before this he did labour under the ill opinion of many of his neighbours, as a man of unrestrained life. I do not advert to the blind account of a fact which happened before his marriage, and so long ago, that even if it were better proved, the man might be considered as *emendatus moribus*; but I advert to the depositions given by many witnesses as to his conduct and reputation at a late period. It is by no means true, that the witnesses do not speak to conduct after marriage. One in particular says, C. was reported to have been connected with a variety of women since his marriage: others confirm this account, and the contrary is not pleaded: the responsive allegation only pleading that he was a man of pleasing manners, but these are frequently associated with very free morals. I may therefore consider it as a fact proved, that C. was regarded in his own neighbourhood as a man of free conduct; but that he was so notoriously profligate as to be shunned by all decent people, and to be the terror of fathers and husbands, is not only not proved, but is contradicted. Some speak to reports which others never heard: some say that they would not admit him into their houses; others, as respectable, speak to the contrary; and that some persons in the neighbourhood cultivated his acquaintance, and lived on the same social terms of intimacy with him as Moorsom did. He was certainly, therefore, not a person of that marked character, that a husband could not introduce him to his wife without putting her virtue to the proof.



More cautious persons might exclude him, but the general reception of him in many families, acquits any one individual of a criminal design in admitting him to their domestic circle. No doubt his character was known to Moorsom. In a capital a man may hide such a character, <sup>4</sup> but in a provincial town that is next to impossible. Here both were brought up in the same town and street. C. was a magistrate, a married man; Moorsom must have known the general opinion, that C. was a man of free character; but that his conduct was so flagitious as for him not to be received, he did not see, for it was not the fact; he saw he was well received. Then I cannot impute an ill design to him, in admitting him into his house. C.'s first introduction to Moorsom's house happened thus:—Moorsom had dined in company with C., and brought him to tea. This shows no evil design in the original introduction. Is there any thing in the history which follows, inferring that such a design was taken up afterwards? I must always carry with me that Moorsom started without suspicion, for he was without ill design: if he had originally entertained a suspicion, there must have been an ill design: and whether his suspicion was afterwards excited is a material inquiry. A violent intimacy was struck up which lasted two years and more; great attentions and assiduity marked by particular circumstances of gallantry, as appears, passing from C. to Mrs. Moorsom. C. was in the habit of buying his timber of Moorsom. I cannot help thinking that Moorsom had reason enough to consider that the intimacy and constant visits were not all on account of the timber, nor all on account of himself. They were very different men in their characters and tempers. Moorsom was reserved and attentive to business; C. was gay and a lively companion; he was not likely to be attracted by Moorsom's society—and judging from the frequency and length of his visits, he must have spent such time with Mrs. Moorsom, and paid such attentions to her, that I cannot admire the quickness of Moorsom's apprehension.

It was said that Moorsom had confidence in his friend. I do not mean to say that a man is to disturb the common intercourse of social life by jealousy; but manly confidence is consistent with caution, and does not exclude the use of reasonable discretion: the wife was free enough in her manners generally, the man was gay: the appearance of the thing was ungraceful, and the intercourse was likely to produce one great harm—the discredit of his wife's reputation. It has been said, that it was strange he should be alarmed when no one else was alarmed: but the contrary is proved: her mother was alarmed, other persons were alarmed. A lady, one of his own witnesses, heard it spoken of in different companies with surprise. It is proved out of C.'s own mouth: for he told his friend,—he supposed he had heard the reports about him and Mrs. Moorsom. It was said, that the husband was the last to hear; <sup>2</sup> and so he is in ordinary cases; because in ordinary cases, he is the last who sees; for caution is observed before him; but here all passed before him; he had the same data and materials for judgment as others. Then he did not see what others saw, or, if he did, he approved and tolerated; and was content that the effects should follow. That he did see, appears not only from a variety of facts in his presence; and in his responsive allegation, there is a contradiction to two of the articles, but none to the third, stating acts of amorous dalliance passing in his presence.

I decline entering into a particular discussion of the acts of freedom,

chiefly because the effect produced on my judgment is not produced by them as detached facts, but as being in connection. When detached, some are improprieties or indelicacies; others not much so; others not at all. Put the question on each distinct fact, and it may not amount to much; but that is not the way of considering the case. I take the whole together; I consider them as a train of assiduities and marked attention, as conduct distinguishing the gallantries of one man to one woman; as making a system of behaviour from him to this one woman which differs from his conduct to others. Other facts are to be connected with these, which, if put in a detached way, do not consist with perfect propriety, as a habit of squeezing her hands, kissing them, and holding them in his before her husband,—not walking out arm in arm only, but her hand in his, and sitting with his arm round her waist. It is not too much to say that a husband, who sees this, is sufficiently indulgent of the person of his wife to another. It was said that manners are different in the country; there persons are not so particular; but these parties are not in the lower rank of life, they are not villagers who can set up the simplicity of rustic manners. The manners of the town, in which these parties resided, seem to correspond with those of any other town. The opinion of the place appears from the evidence of a respectable gentleman, who had considerable confidence in C.; but who, on an interrogatory put to him—whether, if he had seen certain specified liberties, he would have suffered them; answers, if he had seen such, and such are proved to have been taken with Mrs. Moorsom before her husband, he would not have permitted them. I presume that the same would have been the answer of every other person of character in the place.

Another class of facts is—Moorsom's frequent retirement, leaving his wife in the sole company of this man, and giving them an opportunity of private conversation. It has been said, is there any harm in this? but it is to be taken in connection with the other facts. The fact, which alarms me most, is the conversation between Moorsom and his mother-in-law; for though if it were once established that there was blind, unsuspecting, confidence in Moorsom, and not corrupt facility, the law would not refuse him relief; yet it is strange confidence to hold out against admonitions coming from so grave a quarter; moreover he returned an answer, very improper, and, as near as can be, showing an extreme indifference to the consequences. It is pleaded that the mother remonstrated frequently; and I think it is so proved: but the counsel say it was merely a remark of surprise from the mother at C.'s associating on such familiar terms with persons of inferior fortune and station, not a remonstrance with her daughter on the too great intimacy she kept up with him; but it appears, that the remark was made in consequence of his paying much attention to her daughter. The terms used are not mentioned: they must, however, have borne relation to the too great attention. The mother, she once used this expression, "If no other harm happened, her daughter's reputation would suffer:" and Moorsom's answer was, "his best customer must not be affronted."

It is said, why were these remonstrances not followed up? How could they? I must confess Moorsom's answer gave no great encouragement to a repetition of them. Every thing substantial was said. No special pleader could have drawn up a fitter remonstrance, which coming from the mother of his wife, could not fail to awaken the sensibility

of any husband. It does lay open his conduct to this interpretation—~~×~~~~×~~ that he put the timber in one scale and his wife in another, and was willing that the timber should preponderate. But the most favourable interpretation is, "I have such confidence in my wife and in my friend, that I fear no real mischief, and for the mere opinion of the world I will not lose my best customer." In this interpretation of the reply, I do not commend either the discretion or delicacy of it; it at best shows that he was not attentive to the character of his wife, but it does not go the length of showing that there was intentional permission or corrupt facility.

It is said, the elopement is in favour of Moorsom; since, if the parties could gratify their passion at home, there would be no necessity for their elopement. But the answer is, if the parties had formed a criminal attachment they would be uneasy; the one, at living with her husband, the other, with his wife: they would elope to emancipate themselves from this restraint, and not to indulge a criminal passion hitherto ungratified; and I say this the rather, because it is proved to me that opportunities of criminal gratification were not wanting: this is not to be controverted. I cannot therefore admit the conclusion, that no criminal intercourse had taken place before the elopement. Another circumstance is, Moorsom's extreme grief and concern at his wife's elopement, which could not be affected, and is proved to have been vehement: he was much shocked at her infidelity. But it does not appear to me that this inference follows. The sort of criminality which would attach on Moorsom, if the evidence be taken unfavourably, is not that he had a design to get rid of his wife, but that he was willing to make advantage of C. as a lucrative customer, and to purchase this at any rate; he did not wish for a separation as long as he had his wife and customer; and therefore though he was easy whilst this intercourse continued, yet the elopement made him feel different: the sweets of the connexion were gone, and nothing but the disgrace remained. These feelings would be aggravated by the reflection that his own conduct had contributed to this result: and the opinion that the world would form upon it might shock him: the expression of the witness, who states the extreme concern, is, "that Moorsom was very much surprised at the elopement," which, in the point of view that I have taken, is consistent with a knowledge of their previous guilt. On the other hand I must not omit the presumptions in favour of Moorsom: the familiarities were not clandestine: the freedoms were not taken by stealth; they were the conduct of a man of bold and familiar manners, whose actions would not bear the same interpretation as those of other men. Another presumption in his favour is, that the connivance of Moorsom was too much public and unguarded to be insidious; for nothing was more likely to provoke the defence which has been set up.

These are the facts and presumptions upon which the Court is called to decide. I have considered them more at large, because I must confess I have, at different times, felt some fluctuation of opinion. On the one side, here is an unhappy woman who has not met with that care and protection from her husband which she had a right to expect. On the other hand, there were facts that passed in his presence which ought to have alarmed a reasonable man: and Moorsom is not proved to have been deficient in that degree of capacity. But considering, as I am willing to consider, his conduct as the result of unsuspecting confidence, yet

he shuts his eyes after they were opened by other persons,—after the remonstrance of his mother-in-law, with an answer which must ever recur to my mind,—“I must not affront my best customer.”

ol. In pronouncing for a separation, I feel that I shall tolerate a negligent  
; 4. inattention to marital duty; and that I shall pronounce a decree which will not lead to the peace and honour of families, nor to the purity of private life,—to which this Court always attends. On the other side, there are facts of adultery which are grossly and palpably proved, combated by presumptions which the Court is to found by inference, on particular facts, and which, very possibly, the Court, not knowing the husband's feelings, may misinterpret to his disadvantage; and, attributing to intention what is merely the result of dulness of apprehension, injure him by a refusal of relief. But the Court must decide. If the question were, whether Moorsom acted as a prudent, a wise, or an attentive man, the result would be unfavourable: if it were a question, whether, in fact, he contributed to the disgrace of his family, the answer would again be unfavourable; but the question is, whether he contributed with a corrupt intention; and, on a consideration of the evidence, I do not think myself judicially warranted to pronounce that he did so; I am bound to pronounce judicially, and I accordingly do pronounce that he is entitled to his separation.

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### HODGES v. HODGES.—p. 118.

The husband having proved the wife's adulterous connexion with one individual, five years after separation, of which connexion two children were born, the Court held, that the husband's knowledge of, and consent to, gross indelicacies, or even adultery, with three other persons during cohabitation, would not bar him.

THIS was a suit for separation by reason of the adultery of the wife with one individual, during the years 1789, 1790, and 1791. On the part of the wife, an allegation, pleading connivance, was to this effect:—that A., a person of high rank introduced himself to the wife; that the husband was pleased, knew she accepted presents from A., removed to lodgings near the residence of A., who visited her every day: that the husband left the room, often the house; that A. visited her in her bed-chamber when she was without her stays; that in January 1784, the husband and wife being in bed together at two in the morning, A. came to the door, told the husband there was a great debate in the House of Commons, wished him to learn the event—he went leaving A. in the bedchamber with his wife; that A. went away without waiting to hear the result of the debate: that her brother remonstrated, ordered her to return the presents: that the husband reluctantly consented. At Spa another person, B., was attentive; went into her bed-chamber; the husband saw and was pleased; B. took lodgings near them and was often in her bedchamber. At Brussels they lived in the same house with C.; that the husband used frequently to go to bed, leaving his wife and C. together. An action was brought against the party with whom she was charged in the libel, and a verdict for the defendant was given with costs. (a)

(a) *Hodges v. Windham*, Peake, N. P. 39. Lord Kenyon, in summing up, said, that “the husband having suffered such connexion with other men, was equally a bar to the action, as if he had permitted the present defendant to be connected with her.”

The cause was argued by  
*Sir William Scott* and *Dr. Swabey* for the husband.  
*Dr Nicholl* and *Dr. Laurence* contra.

JUDGMENT.

SIR WILLIAM WYNNE.

The evidence is such that the counsel for the wife have not aimed at a denial of her guilt; but, as a defence, recrimination and connivance are set up. The first is not proved; the second defence is singular,—the wife does not allege that she had been guilty, but that there had been during their cohabitation previous to 1785, when a separation took place, a freer correspondence than there should have been, between her and other persons, with which her husband was acquainted, whence it is to be inferred that she committed adultery with them; but this adultery is not pleaded by her, nor by the husband. I take the law to be, as laid down in the books, that if it appears that the wife committed adultery, that the husband connived at her adultery, that he knew that she was living in that improper manner, that he was aware of what was going on, such conduct deprives him of a right of applying to the Court and obtaining a remedy for the injury done him—if it can be considered as an injury. But when I say that this is the law, I admit, at the same time, that I do not remember any one instance, nor am I acquainted with the circumstances of any case, in which a sentence has been refused on this ground, (a) except in the case of *Cibber v. Cibber*, where it was said, that connivance was clearly 22. proved. (b)

It is strange that there should be no precedents, for I should have expected that such a defence must frequently have been set up. But, however, I do not doubt the law to be so, provided that, on a suit brought by the husband, the wife could show that the fact complained of was done with his connivance. In such a case, the Court would not pro-

(a) The cases of *Timmings v. Timmings*, p. 76; *Lovering v. Lovering*, p. 85, had, how- 22-  
 ever, been recently decided in the Consistory Court.

(b) The Editor has considerable doubts whether sentence was ever given in *Cibber v. Cibber*: 27-  
 he can discover no trace of a judgment in any note to which he has access, and all that he can find in the Assignment Book of the Consistory, respecting the proceedings of that case, is as follows. *Cibber v. Cibber* was a suit for restitution of conjugal rights, brought by the wife. The citation was returned on the first Session of Michaelmas Term, 1738. A libel was admitted and the marriage confessed. An allegation of Faculties was given in; alimony allotted; costs were twice taxed, and twice excommunication was pronounced, and a significavit issued against the husband. An allegation on the part of the husband was asserted but not brought in; publication passed of the evidence; the cause was concluded; and on the by-day after Michaelmas Term, 1739, the Proctor for the wife porrected, in penam, a sentence, and prayed the husband to be condemned to alimony and costs; when the Judge, having heard Counsel in support of the prayer, took time to deliberate. On the by-day after Trinity Term, 1740, the sentence was again porrected, and the prayer repeated. This assignation was continued at different intervals till the second Session of Michaelmas Term, 1742, when the cause stood to be sentenced, as before. The assignation was then further continued till the third Session of the next Term; but there is no further trace of the cause.

For the circumstances at Common Law of this case, see *Cibber v. Sloper*, 1 Selwyn, N. P. p. 10. (n. 4.)

The action was tried before Lee, C. J. Middlesex Sittings after Michaelmas Term, 1738. The Plaintiff and Defendant lived in the same house: their bedrooms communicated. Mrs. Cibber used to undress in her husband's room, and retire to Sloper's room, with a pillow taken from the bed of her husband, who shut the door after her, and wished her good night. He sometimes called Sloper and Mrs. Cibber up to breakfast.—Verdict for Plaintiff—damages 10l.

However, "the law on this subject is now clearly settled to be, that if the husband consent to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even of loose or improper conduct, not amounting to consent, it only goes in reduction of damages."—Per Buller, J., *Duberly v. Gunning*, 4 T. R. 657.

nounce a sentence; but that the wife having committed adultery with one or two persons, on account of which the husband quits her society and lives apart from her for many years, during which she without his knowledge contracts an acquaintance, and commences an adulterous intercourse with another person and cohabits and has children by that person, the husband because he once knew of the adultery of his wife with another, and did not complain, should be bound to retain his wife and take her children—the fruit of this adulterous intercourse as his own,—is a very different case; I cannot think the law goes so far; I know of no case except *Cibber v. Cibber*, where the sentence was refused on the ground that the husband knew of and consented to his wife's guilt without complaining; and the great distinction between the two cases is, that here the adultery was committed with another person, and at a great distance of time. For this reason it is not necessary to examine minutely into the evidence as to the connivance, but taking it to be as criminal, and as complete as possible, supposing that the husband was cognizant of, and conniving at her adultery with the three persons mentioned, yet the parties having separated by articles in 1785, and there being no account of any adulterous connexion of the lady till 1789, when this new connexion is mentioned of which children have been the fruit, I cannot think that the law is so severe as to bar the husband of relief. One child was born just after this suit was brought; she had another child afterwards, this may go on forever. There is, then, a strong ground why the husband should complain when he finds children are born; each child was baptised by the name of the husband; this may be a severe grievance, an irreparable injury: for the presumption of the law is, that these are the legitimate children of the husband. (a) I think this is such an increased injury that, under the circumstances, (b) the party is justified in applying for relief. The adultery is proved: the recrimination is not proved; the connivance at her criminal or indelicate conduct proved is not sufficient in law to operate as a bar. I pronounce for the separation. As to the verdict, the Court does not know upon what grounds it was given. All that appears is, that on the whole case the husband was not thought to have established his claim to damages.

(a) It was pleaded in a responsive allegation by the husband, that though he had not cohabited since 1785, that his wife was delivered of a child in 1791, at the house of the adulterer; that she declared "it was a pity it was a girl, and that such an estate (meaning her husband's) should be lost." That a son was born in October, 1792; that the husband went abroad in 1791, that he came to Paris, that he heard his wife had left that city on the day before; that he was advised to go away, lest she should return and assert him to be the father of the child."

(b) This consideration seems to have had much influence in the decision of the learned Judge; but it may perhaps be doubted, whether any such weight would be attributed to it since the case of the Banbury Peerage has more exactly ascertained the strength of this presumption. See the answers of the twelve Judges to a question proposed to them by a Committee of the House of Lords, at the conclusion of the arguments in the Banbury Peerage case. The answers will be found at p. 433 of Mr. Le Marchant's Report of the Gardiner Peerage case, to which is appended a collection of cases illustrative of the Law of Legitimacy and a valuable report of the claim to the Earldom of Banbury. See also 2 Selwyn, N. P. p. 745, et seq.; 1 Phillips on Evidence, 158.

## CREWE v. CREWE.—p. 123.

On a suggestion that a charge of collusion and connivance, raised in argument on his own evidence, was a surprise on the husband, there being no counterplea or interrogatories, the Court refused to rescind the conclusion in order that letters might be pleaded, holding, that the husband was bound to guard himself originally against such suggestions.

A constant intercourse, continued for four years, between a wife and her paramour, not clandestine, but the common subject of conversation among servants and friends, raises a grave suspicion of the husband's knowledge and acquiescence.

On proof of the wife's adultery, continued for four years, under circumstances which raised a strong suspicion that the husband could not have been ignorant, the Court, after much hesitation and difficulty, granted the sentence of separation, as it could not affect the husband with a direct knowledge of the adultery, and as three witnesses had positively sworn they believed the husband was ignorant.

Witnesses should be required to answer to their belief or impression, as to whether adultery <sup>47</sup> has been committed or not, though the Court cannot rely on such opinion.

On proof of adultery, sentence may be barred—1. by *compensatio criminis*; 2. by condonation; 3. by active procurement or passive toleration;—and, possibly, by other conduct.

Collusion is an agreement between the parties, for one to commit, or appear to commit, a fact of adultery, so as to suffer the other to obtain a remedy at law as for a real injury. The law permits no cooperation for such purpose, and refuses a remedy for adultery committed with such intent; but it is not proof of collusion, that, after the crime is committed, both parties are desirous of a separation.

The 105th Canon requiring that divorce should not go on confession alone, the Court is almost bound to reject an affirmative issue in a suit for separation for adultery.

Passive connivance, or toleration, arising from the husband's insensibility to his own honour, or unwillingness to seek redress is a bar to relief; if there be proved a long course of criminal conduct, of which he was, or of which he must be presumed to be cognizant:—he may wait for adequate proof, but no longer.

The long duration of a criminal intercourse, and delay in applying to the Court, and the indirectness and want of stringency in the evidence, are strong presumptions against a preconcerted scheme to obtain a sentence by contrivance.

A judgment by default against the paramour, and no defence on the part of the wife, are not proof of collusion.

Passive sufferance of adultery for a length of time enures to a waiver of legal remedy, but is difficult of proof.

THE argument in this case took place on the 3d of May 1800: Dr. Arnold was counsel for the husband. Sir John Nicholl and Dr. Fisher who were counsel for the wife, rested their case on collusion, connivance, and insufficient proof of adultery.

The Court took time to deliberate.

On the 11th of May, the husband's counsel made an application to the Court to rescind the conclusion, (See *Hamerton v. Hamerton*, Vol. II. p. 24. [4 Eng. Eccl. Rep. 13.] and note. See *Jones v. Jones*, Vol. I. 254. [3 Eng. Eccl. Rep. 108.]) as connivance was suggested by surprise at the hearing, there being no plea nor interrogatories on the subject—that as the charge of collusion could not be foreseen by the husband he had omitted to bring evidence to repel it: the husband now offered an affidavit with certain letters, and prayed the conclusion to be rescinded, to meet the suggestion of surprise by introducing proof consisting chiefly of exhibits (the least suspicious evidence) and to introduce in this Court before sentence that which he might, it was apprehended, introduce in the Court of Appeal.

Contra.—There is no surprise; the charge arises on his own evidence: that they are *noviter perventa* cannot be averred of these letters.

*Per Curiam.*

I apprehend this application is not made as a matter of right, but of indulgence and discretion—that is, of such indulgence as can legally and

justly be given, and as is governed by a regard to the genuine and fair administration of justice. I should be unwilling to deprive the party of a remedy on any thing which appears to have been suggested as a surprise; and, if that suggestion were founded on facts appearing in the case, I would, in a matter of such importance to the husband's comfort, allow this evidence to be introduced, though the inconvenience of doing so generally is evident; but I am of opinion that the suggestion of surprise is not founded. The objection of collusion and connivance arises on evidence produced by the husband himself, not on matters extrinsic; and he is bound to guard against all suggestions, not merely in the plea of the other party, but, which may arise on his own evidence: if the original facts pleaded furnish such objection, he is bound to repel that by the original proof; and if he slumbers over his own remedy for such a length of time, he is not to be allowed any extraordinary indulgence in order to escape from the effect of it. How far the present evidence may affect the husband it is not for me at present to pronounce; but I am by no means inclined to allow that this is matter of surprise, for it does not grow out of any thing external. I shall therefore admit no further pleadings in this stage. There is, however, a letter referred to in the original evidence, which communicated the transaction that had passed, and the misconduct of Mr. Crewe: this letter I have some curiosity to see, and, if the party think proper, I would allow this to be introduced: but I cannot consistently with practice and general convenience, admit the others.

The "letter" having been brought in, the Court said—I have great difficulty upon the point of toleration. If the wife does not take the objection, the Court will. The husband must lay his case before the Court in such a manner as not to give occasion for such an inference. In this case there has been a course and system of habitual intercourse for four years, which could not exist without the husband's knowledge: if he had a conversation with his own servants he must have learnt it. I have no reason to suppose that all the servants in the house were leagued in a corrupt faction. Even this letter, which leads to the discovery, startles me; it is rather stimulatory on the part of the paramour's friends than a letter of information. I think it points strongly to previous knowledge. The case must stand over.

#### JUDGMENT.

SIR WILLIAM SCOTT, (LORD STOWELL.)

The parties were married at Jamaica in 1780, and have had five children. A lady, who resided with them from 1793 to 1797, says, "the gentleman visited in the family; till 1795 she observed nothing particular; when she was at Brighton, this gentleman was much with them: he called in London, and when Mr. Crewe was at home only left his card."

Witnesses also prove, "that he constantly visited Mrs. Crewe and remained alone with her when the husband was absent: but that, when he was at home the visiting was in the usual form." The footman, who went to live with Mr. Crewe in August, 1797, mentions likewise "their coming from card parties in hackney coaches together, till they were near the husband's house, and that then the gentleman got out." The same witness deposes, "that he was frequently despatched with letters from her to him, and, on one occasion, about the time when Crewe was going out; that the gentleman came late in the evening, and that



on the husband's returning home, he was let out clandestinely by Hawkins, the lady's-maid." Another, a maid-servant says, "at Richmond he visited as a common acquaintance, but afterwards at Brighton was on a different footing:" she speaks to "his opening the door himself—to his knocking by a single rap—to his paying great attention to Mrs. Crewe:" and both say, "that the impropriety of these visits became the subject of conversation among the servants." Hawkins also is examined. Such witnesses force the Court to observe, that when servants degrade themselves by living with a woman corrupted they partake in the corruption of the house; they can neither see nor hear any thing. All that can be obtained is, an ounce of truth mixed up with pounds of equivocation and the various artifices by which corrupt minds endeavour to palliate vice: but I must take the evidence as I find it.

Hawkins says, she saw nothing but what was pure and proper; yet I apprehend, even from her account, that the gentleman did visit Mrs. Crewe in a way that was not consistent either with purity or propriety of conduct. Another witness, a friend of Mr. Crewe, called at Mr. Crewe's house, and found Mrs. Crewe alone: she gave a little hem or said, you may come in." The paramour came out of an adjoining room: she said, "he withdrew because he thought it might be some one whom he would not wish to see." Crewe was then absent. The witness called on another occasion: she said something—the servant replied that the witness was on the stairs—he found her and the lover in the room. This is the only witness who speaks to any thing respecting the anonymous letter: but there is no account in the evidence of what measures were taken on the receipt of it, though there is in plea. 45.

It appears from that time the husband and wife lived apart, and the conduct of the wife and the paramour became more clearly improper. The footman says, the lover was there the first day he came; was always there afterwards, and at all places, and every day; boarded in the house; stayed till one o'clock in the morning. Witness saw Mrs. Crewe in his bedchamber, and saw him twice in hers, early in the morning; it was evident there was great fondness; has found them with the doors locked. Sarah Pulteney says, he visited her in the morning, and again in the evening; at the Isle of Wight he was constantly with her, and also in town; dining, supping, and staying late; slept two or three times with her mistress at Haverstock. At Southampton she waited upon her instead of her maid, and put her to bed; the paramour sat an hour by her bed-side. One night she was sent by Mrs. Crewe to tell him she was in bed. On passing through the room afterwards, she saw his clothes, and the curtain close drawn. This is another fact which leaves no doubt that the parties were in bed, and were living on a criminal footing together; it gives a colour likewise to all the antecedent conduct—it shows what the connexion was originally.

I must here notice that the depositions have not been taken exactly as the Court could wish; nor as is usual in these cases. That part of the allegation, which directly pleads that adultery did take place, has not been examined to. The Court, though it cannot rely on the opinion of the witnesses, has a right to know their impression and belief, whether the crime was committed or not; and it is material that the examiner should understand that it is necessary the witnesses should be required to give this information.

On the action at law there has been a judgment by default: and, on

inquiry before the sheriff, damages were assessed at 3000*l*. What evidence was there produced does not appear to this Court, and part of the evidence here, viz. that which relates to the conduct subsequent to separation, is posterior to the action. Notwithstanding then the exceptionable mode in which the evidence has been taken, I think, attending to the later depositions, the matter of adultery is on the whole sufficiently proved; and if there are no objections to the conduct of the husband, he is entitled to his sentence of separation.

There may be, however, such objections, and of various kinds: 1st. Recrimination—for that is a bar by the law of the country (a) 2d. Con-  
50. donation—unless there be a renewal of criminal conduct: (b) 3d. Active procurement, or passive toleration, of his own dishonour: and there may be others. Of these, not one has been put in plea by the wife, nor suggested in interrogatories; for she has not even cross-examined the witnesses. But, in argument, two defences are set up—collusion and connivance. These are different in their nature. Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose (c). Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible, it would authorize parties to violate their marriage vow, and would encourage profligate and dissolute manners. The law therefore requires, that there should be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult of proof, since the agreement may be known to no one but the two parties in the cause, who alone may be concerned in it, for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion, that after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released, because the offending wife equally wishes it; she may have honest or dishonest reasons, innocent or profligate; and an aversion to live with the man she has injured, a desire to live uncontrolled, or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it.

It has been often said, and with peculiar injustice, that although the original adultery was not collusive, yet the proceedings in these Courts lead ultimately to collusion in the conduct of the cause; because, as the suit is between the suffering and the offending party, the latter frequently prays a sentence which she does not wish to obtain. On a little consideration, however, it will be seen that this arises from a wise provision

(a) *Forster v. Forster*, 1 Consistory Reports, 144. [4 Eng. Eccl. Rep. 358.] *Proctor v. Proctor*, 2 Consistory Rep. 292. [4 Eng. Eccl. Rep. 543.] *Astley v. Astley*, Vol. I. 714. [3 Eng. Eccl. Rep. 231.] &c. &c.

(b) *Durant v. Durant*, Vol. I. 733. [3 Eng. Eccl. Rep. 310.]

23x. (c) It is presumed the learned Judge did not mean that connivance cannot exist in any case without collusion; for it seems that the husband may, by winking at (*connivere*) and pretending not to observe attentions paid to the wife by, or her attachment for, another man, lure her on to adultery, for the purpose of a separation, and obtaining damages from the paramour; and this may be done without the wife's or paramour's suspicion that the husband saw what was going on: whereas collusion must be an act in which two or more parties join to deceive the Court or entrap another party.

of law: the Canon directs, that a divorce shall not go upon the mere confession of the party, (see *Timmings v. Timmings*, supra, 22:) the wife therefore must give a negative issue: (indeed the Court is almost bound to reject an affirmative issue, since it is necessary, by the Canon, that evidence should be produced): she must deny her guilt, and her prayer must be according to her denial; but this is mere style and form. If the Court sees a fair case made out, what may be the inclination of the wife, be it corrupt or honest, is of little importance; the question is, whether the husband has received a real injury, and bona fide seeks relief. x

Another ground of objection is, the connivance or toleration of the husband: he may have an insensibility to his own honour, and, from a conformity to the corrupt manners of the world, may have no wish to pursue a legal remedy, or may not think it worth pursuing; and if such a person, after a long continuance of toleration, of himself awakes, or is compelled by the clamour and outcry of the world to awake, he awakes too late. If the adultery has gone on for a length of time, he does not stand before the Court in the favourable light of a person acting on the spur of honest feeling, whom the law 'delights to succour'; he has made up his mind to some other satisfaction. I do not mean by this to say, that the husband is immediately to rush into Court upon suspicion; he must wait for adequate proof, but he is to show his vigilance; he is not to lay by longer than to obtain proof: if he does, his lethargy will be fatal to any application that he may make: whatever his motives may be for coming afterwards, if it be proved that there has been a long course of criminal conduct of which he was cognizant, or which, by law and by presumption, he must be supposed to have been cognizant, he cannot receive relief. 414

What are the circumstances here as to collusion and to connivance? The long duration of the criminal intercourse is a strong presumption against collusion, for if there had been a preconcerted scheme, an original design to separate, I think it impossible but that the application should have been sooner made, and that the purpose would have been more speedily effected. This applies to all the evidence before the separation; and as to the latter evidence, after the separation, there is much force in the observation, that if the parties had intended to have obtained a sentence by contrivance, the proofs would have been more direct and conclusive; though at present they are sufficiently so to warrant the Court in saying, that the adultery is established.

It is true, that the adulterer suffered judgment by default; that may, in some cases, arise from collusion, but it also may arise from other motives—from prudence and discretion—from a hope of mitigation of damages—from a desire of not further vexatiously annoying the party whom he has injured. The wife too has given in no plea, nor administered any interrogatories; this may arise from collusion; but it may also arise from other circumstances, at any rate the husband cannot compel the wife to do either. Looking, then, at the general circumstances of the case, I am not entitled to say that there is collusion.

I come then to the next head of objection, viz. connivance or toleration for other purposes: and this is the part of the case which presses with most force. By toleration, I mean that passive sufferance of adultery for a length of time, which, in law, enures to a waiver of legal remedy. The proof of this is difficult enough; for it must arise in gene-

ral not from a positive act, but from negative conduct—inactivity. If information were proved to have been conveyed to him, that would be decisive: and if there be nothing of that kind, still the circumstances may be so strong as to raise an almost certain presumption, that he has seen; and, if seeing, has tolerated. There are circumstances in this case which set in an uniform current in that way: the general mode in which these parties lived together is extraordinary and not unimportant: there was no formal separation, yet as much estrangement as can well consist with the marriage state: she is allowed to go to Bath, to Brighton, and to other public places, without the husband being there for more than a night or two: the Court cannot compel the husband, even if he has no office nor profession that prevents him, to be constantly with his wife; but every man must observe that this husband did not give his wife the benefit of his care. I do not say that the husband is to dog his wife at every step with sullen and gloomy suspicion, but the protection and comfort of his society is to be afforded to a person so closely connected with him, and in whose conduct his happiness as well as her own is involved. What was the state in which these parties were living? As soon as the husband went out, the lover came: the visits attracted the notice of all but the husband; it was the common conversation among the servants; and this sort of intercourse continued for four years and more: and yet it is to be presumed that the husband was ignorant of the fact, or if not, he was perfectly unconscious of the nature of these visits. According to the modes of life with which I am acquainted, it is not very reconcileable with credibility that a man can be so much a stranger to his own house, as that a person, not particularly connected with him, shall enter his house almost constantly as the master quits it, and that the other facts proved in this case, should happen. I know well, that it is not uncommon that the husband is the last acquainted with the dishonour of his family;—that may happen where the facts occur at a third place, where there is great intimacy with the husband, and advantage taken of it; but that is not the case here: there was no particular acquaintance with the husband, yet these continual visitings going on day after day, for months and years, are noticed by every one, and still it is pressed upon the Court, that the husband remained ignorant till he received the anonymous letter.

There may be modes of life with which I am little acquainted, and which may allow things to pass of which I have no idea, and which may afford opportunities no situation I am acquainted with does afford. It would be of lamentable consequence that such visits could be so paid for years; that every time the husband went out, another man could come in with views observed by all, and yet that the husband should have no information communicated to himself or his friends from the variety of servants whom he entertained. There are one or two facts of a peculiar nature that strengthen this difficulty,—first, the carelessness with which they carried on their intercourse: the lover came to the house on the husband going out at a late hour; he came within about half an hour; it is not stated that Crewe's absence was foreseen, or a message sent to the lover; the latter continued till the husband returned, sitting in the drawing-room into which there was the greatest probability that the husband would enter, if he returned: he did return, and instead of going there, he went to the kitchen and talked to the servant: the servant heard Mrs. Crewe call her maid to let out the paramour; she did let him

out; the opening of the door was heard in the kitchen. It is impossible, therefore, that there could be greater negligence; there is no appearance of that circumspection for which a witness gives these persons credit. The facts mentioned by that witness are also extraordinary; and do not convey to the Court the same impression of the circumspection of the parties that he received. This fact of the lover being entertained in the absence of the husband happened twice within his knowledge. The lover was secreted in an adjoining room, and he was let out again with as little affectation of secrecy as may be. An anonymous letter<sup>46.5</sup> is now produced: it is not a letter of information, but rather seems to refer to antecedent knowledge. It conveys no distinct information to a man perfectly ignorant, but calls upon him to support his honour, as the tongue of the world is loud against him. It is said, that subsequent letters are of a different character, expressing passion, and that the wife was apprehensive of his passion; it is, however, suggested that such would not show sincerity, but are exactly what he would write if he now came to change his conduct, and determined on vindicating his honour by applying for a remedy.

These circumstances press strongly on my mind; but when I consider that the proof of adultery is clear, and, as to the inattention, that the parties had been married twenty years, had five children, there might be less circumspection and a more unlimited confidence on the part of the husband: but there was not less fervor in her blood than at a former period. What were Mr. Crewe's habits that might produce this estrangement do not appear. I will not take upon myself to say, that there may not be modes of life in which there may be such conduct and such ignorance; but it is not for the happiness of the world, nor for the security of married life that such should often occur. Seeing little, or rather nothing of this gentleman's mode of life, I cannot say it is impossible. Not being able to affect the husband with a direct knowledge; and there being three witnesses who swear, in express terms, that they verily believe in their consciences the visits were unknown to the husband, I think it would be taking upon myself too much to affirm, in contradiction, that they were known to him. Therefore, under all these difficulties I am compelled to pronounce for the divorce, though with no great satisfaction of mind: and I will add that possibly, in other places to which this case may be brought, the nature of it may be more accurately disclosed. 161.

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### HOAR v. HOAR.—p. 137.

Mere imprudence and error in judgment are not connivance; and, in determining whether the husband's behaviour has barred him from relief on proof of his wife's adultery, the honesty of his intentions—not the wisdom of his conduct—is to be considered.

Affectionate conduct to a wife for many years, no appearance during that time of a wish to withdraw from her society, and the absence of any reason to suppose that the husband knew or suspected her depravity, till very shortly before she left him, tend most strongly to disprove connivance at the turpitude of, or active co-operation in, the prostitution of a wife.

#### JUDGMENT.

SIR WILLIAM SCOTT (Lord Stowell).

THIS is a suit for adultery brought by the husband against the wife. The parties were married in 1787, and went abroad to India in 1790.

In the following year, Mr. Hoar, leaving his wife at Madras, joined the army, and while on military service, formed an acquaintance with an officer whom he afterwards introduced to his wife. A great intimacy ensued; this officer was much at their house, and much intercourse took place between the parties in India.

Mr. and Mrs. Hoar returned to England in September 1793, and settled in Hampshire. This officer arrived in February 1800; he paid them a visit soon after, and also another the same summer with his mother. Mrs. Hoar was indisposed and recommended to go to Tunbridge, but first to take advice in London; when she and Mr. Hoar, accompanied by this officer, proceeded to Tunbridge. She used his curicle as easier than her husband's phaeton, but a servant always attended them. On their return, they paid a visit to this officer's mother in London, and then went home, where they were visited, on the 12th of September, by that lady and her nieces, and were soon afterwards, viz. on the 25th of September, joined by the officer who staid there till the 6th of October, while his mother remained till the 7th.

A maid-servant observed, "two or three days before, some uneasiness between Hoar and his wife, but had not the slightest suspicion of the cause. After the 6th of October, Mrs. H. ordered the witness to pack up her things to go to her uncle's for a few days only: the journey was put off to wait for Mr. Hoar's brother. On the 9th they set off. Witness believed they were going to her uncle's; so did the man-servant; and the witness adds, she believes her master did the same. At Hounslow, Mrs. Hoar ordered the post-boy to go to an hotel in London; witness asked her, 'if she was not going to her uncle's?' said, 'not to-night.' On arrival at hotel asked if rooms were prepared—they were. The officer came, dined, and supped there. Her mistress, in her bed-room, told her she was extremely miserable, but said nothing more. The next day the maid asked to go and see her relatives: the officer came before she went; on her return at night she found Mrs. Hoar gone; the next morning the officer came and carried her to Ealing. She mentioned the uneasiness between Mr. and Mrs. Hoar, and that Mrs. H. seemed to wish to explain: he said, Mrs. H. would explain: near Acton, at a small house, found the officer's mother. She saw Mrs. Hoar's clothes, but was not permitted to see her mistress: the officer told her Mrs. H., being ill, declined to give the explanation she had promised, and he made it by her desire. Mrs. H. had an attachment for him and would not return to her husband—asked if she would stay—she said (very properly) 'she would not live with a mistress whom she could not respect.'" [Evidence of cohabitation at Kensington and subsequent adultery.]

No doubt therefore can exist that Mrs. Hoar was guilty of adultery; and, unless something is proved to bar the husband, he is entitled to a sentence. There is nothing of the same immorality suggested against him; but if there is no turpitude of his own, has he connived at the turpitude of his wife? for that would bar him; still more would it bar him if he has actively contributed to her prostitution. This is suggested, and it is said that it appears from the libel itself—from the depositions of his brother and of his friend—from her letters—and from his own conduct. Two things are to be premised. First, that he had been a very affectionate and kind husband for thirteen years, and during that time there was no appearance of a desire to withdraw from the society

of his wife; still less to get rid of her in this foul and dishonourable manner. The second is, there is reason to suppose he neither knew nor suspected the depravity of his wife till within two or three days of her quitting his house.

It does not appear that any thing had occurred to awaken his attention or rouse his suspicions in India. The officer had been separated from Mrs. Hoar for seven years—time enough to cool the force of any attachment if it had existed; he comes to his house; nothing passes there to excite his attachment; nothing to alarm any person connected with the family; nothing which is not within the limits of such intimacy as modern manners allow; nothing till she acknowledges this attachment herself.

All the evidence therefore of passive connivance, or of active encouragement, is confined to the last two or three days. This is very material; for it is incredible that Hoar should at once so change his principles and conduct, and in so short an interval resolve to dishonour his wife and friend; there must be very precise evidence to bring this home to him. It is not mere imprudence and error of judgment which the law deems connivance; where a man takes a step for the best which turns out otherwise, it is not such an error which is to be laid to his charge. Different men have different degrees of judgment, and judge differently; nor are we to judge by the event. A Court of justice must look *quo animo* the step is taken, and, if it be meant well, though it have a fatal consequence, it were hard indeed to fasten on mere imprudence the consequence of guilt. Conduct to bar must be directed by corrupt intention. His situation was extremely difficult.

It is pleaded, "that on the 1st of October, the husband noticed her coolness and indifference, but conceiving that her temper might be affected by indisposition, took no notice of it till Friday the 3rd of October, when he asked her, 'if they were always to go on in this unhappy way?' She said, 'Yes, for ever.'" She acknowledged a fixed attachment to this officer, "that she had loved him from the first day she saw him in India—that she adored the ground on which he trod—that she had not dishonoured him, and she begged him not to mention it whilst the officer's mother was there." By this avowal the unhappy husband was placed in a situation requiring the exercise of the greatest discretion. How was he to act so as to produce good consequences? It is said, that he should have resorted to bodily coercion, and perhaps that would not have been improper. At a time when the violence of her blood must have been over, when she had been married thirteen years, to avow such an attachment, to renounce all virtue, modesty, honesty, duty, and regard to her family, did betray symptoms of that malady of mind which requires such discipline; but these extremities are in no case to be resorted to at once—milder expedients should first be tried.

"Sunt verba et voces quibus hunc lenire dolorem."

Hor. Epist. i. v. 34.

Besides, in other respects, she did not show insanity, and there was nothing which betrayed this to the rest of the family. In this sort of dubious state, can it be said that a man does wrong if he takes a little time for honest deliberation of his own, and for consulting with his friends? He did advise with his brother and with a friend, and in the meantime he abstained from any thing violent. If this was an error in

judgment, it was excusable in such delicate circumstances. Before his brother came, viz. on the evening of the 5th of October, the husband communicated his wife's declaration to the officer. This conduct has been much blamed; it is said that it was very indiscreet, nay very improper, to communicate this attachment: he told him of her declaration of attachment, and the conversation that had passed—represented to him the breach of hospitality and friendship he was meditating—expressed his hopes that his wife would see her error and that things would end well, but declared, that in the mean time he could not entertain him in his house. The officer appeared much affected; and accordingly went early the next morning. It has been said, that this was telling him how easy a conquest he might make. It was, however, necessary to tell him in some way, for he must be sent out of the house: perhaps it would have been less exceptionable, if, instead of proclaiming to him her strong declarations of affection, he had stated that she showed some uneasiness of mind; possibly some gentle and mild communication might have been more prudent. But I cannot say this explicit declaration necessarily led to the consequences. I know no system of morals by which it is necessary for a man, if a friend's wife or daughter express a guilty passion for him, to give way to the depraved inclination of such a woman, and to forget all he owes to his friend. Perhaps even this mode was not so very imprudent: he might expect, and not unreasonably, that his friend would assist him in counteracting the perverse inclinations of his wife. His account stated, that the officer was affected by this appeal: happy would it have been, if this impression had remained! At the same time I give into the observation, that the communication might possibly have been contrived in a more discreet manner.

However, the intimate friend of Hoar was sent for,—he found Hoar, in great agitation. He said he had sent for him to consult with him,—that his wife had acknowledged this guilty attachment,—that he wished her to go to her uncle's to compose her mind—that he feared suicide; he begged his friend to talk to her,—to say he was convinced that nothing criminal had passed, and that if she would conduct herself with propriety he would forgive her; he saw her, she avowed to him her love for this officer, and said, in a determined way, that she would go to her uncle's,—that she would see this officer once more, would stay a few days at her uncle's, and then, if she could get the better of the idea of suicide, would return. He remonstrated with her on the propriety of her seeing the man, not against her going to her uncle's: she persisted; he, hoping her uncle might persuade her not to see this man, and trusting that nothing criminal would occur, invited her to his house when she should return. As for the witness acceding to the proposal of her going to her uncle's and to her seeing the man, Hoar is in no degree answerable for it, unless he adopt it. I will observe this only, that there could be no corrupt motive in the witness, which would go far to remove it from Hoar: the witness had no reason to think his advise was asked other than from honourable motives. The same conversation took place with the brother. Other judgments might have been differently exercised; but it is not a question of wisdom, but of honesty of intention. It is not distinctly stated in the evidence (as it should have been) whether the dangerous part of this compact—the interview at her uncle's with the officer—was made known to the husband: but it was the duty



of the friend and the brother to communicate it, and I must presume that they did.

Assuming, however, that he did know it, yet she was to be placed under such guards at her uncle's, who had a previous knowledge of the whole, that Hoar might anticipate no danger: her uncle might dissuade her from seeing this officer—could watch her if she did—his friend was persuaded no dishonourable consequences would ensue, for he invited her on her return to visit his wife. But, looking at the difficulties with which the parties were surrounded, I see no proof of corrupt conduct; nor any thing to show they entertain a doubt of her going to her uncle's; they were alarmed at her threat of suicide, more than cooler men might have been. I should have had little apprehension from the bottle of laudanum which she had. The result of their deliberation was,—that she should go to her uncle's, should take a last farewell of the object of her depraved attachment, on an understanding that nothing improper should pass, and that the interview should take place in her uncle's presence; but that is no corrupt conduct: I do not say it was wise,—perhaps a set of cooler men might determine otherwise, especially after the fact has happened: they might even have foreseen the event,—they might have considered that a woman, who had so violated her duty to her husband, was not much to be trusted: but they appear to have had an intense confidence in her sincerity, and possibly might hope that the man would have resisted the temptation, and acted more honourably and generously by his friend. The case seems to have been reduced to a question of bodily coercion, or this allowance. She was going to a venerable relation; other methods of expostulation, of reasoning, and of remonstrance had failed. In determining on the former alternative, they perhaps did not act prudently, but they did not, on the other hand, act dishonestly.

She however went, and it is objected that she was not duly accompanied. I think their prudence was asleep; she positively refused the attendance of Hoar or his brother; and they acquiesced. This refusal couched in these strong terms of resistance, possibly ought to have excited more alarm; and should have made them insist the more firmly on one of them attending her: she was, however, accompanied by a female servant who had been long in the family—a woman whose conduct was not tainted by her mistress' guilt, whose principles are excellent, and one to whose care the duty might well be delegated, as far as it could to any person in her situation.

Another objection is, that on the receipt of her letter, Hoar did not post up to town soon enough; but the short interval that elapsed goes far to take off the force of this. The letter of the 9th of October mentioned that she had seen the officer. Hoar had reason enough to presume, that her intention of going to her uncle's was much shaken, and even that the worst consequences had already followed, or would occur before his utmost diligence could have brought him up; in truth, if he had come, he would not probably have arrived till they were at Kensington, when the commencement of his dishonour would have begun, and when his wife was only to be regarded with horror and disgust. I am, then, of opinion that, though there may have been considerable mistakes in the treatment of this lady, there has been no corruption.

I am not ignorant that the same case has been before the great tribunal of the country which has held, that no damages were due to the husband. If there had been here the same question, on the same evidence,

between the same parties, and for the same purpose, it would have been a great comfort to follow the judgment of that eminent person to whom the law and morals of the country owe such important obligations. There, probably, more evidence was given as to the conduct of the paramour; it might be shown, "*non rapuit sed recepit*"—that he was not the thief but the receiver of her affections—that he was not the active seducer, but that she was the victim of her own loose principles and vicious inclinations; that he therefore owed no compensation in damages. On the very same ground that the action failed there, this Court would—on the question, whether Mr. Hoar is obliged to cohabit with his wife—give its sentence in the negative; for if she be the corrupter of her partner in guilt, the husband is so much the more entitled to be relieved from her depraved society. My judgment does not clash with the other judgment, but both rest on the same foundation. (a) I pronounce that the adultery is fully proved; and that it is not proved that the husband has intentionally contributed to it.

(a) See, however, a report of *Hoar v. Allen* (this case), 3 Esp. N. P. C. 276, and a notice of it, 1 Selwyn, N. P. p. 11. (n. 4.) and p. 24. The letter from Allen to Hoar, referred to in *Espinasse*, formed no part of the evidence in *Hoar v. Hoar*, and, of course, the letters from the wife to the husband, after her elopement, could not be evidence for him in his action against Allen.

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### MICHELSON v. MICHELSON.—p. 147.

The adultery of the wife being proved, but she having, with her children, but without her husband, resided in a gentleman's house (of which she was treated as the mistress, and where she was delivered of three children,) without the husband sufficiently accounting for his absence, or providing for her, or interfering with such residence, the Court dismissed her, on the ground that the husband, by such conduct, had consented to the connection and adultery.

THE facts in this case were shortly these. The parties were married in August, 1792; and in 1799 came, on their way to London, to Peterborough, where the wife was confined. The husband shortly returned to Scotland with two of his children. Soon after, a gentleman pleaded to be an intimate friend of the wife and her mother, and known to the husband, was admitted on a familiar footing in the family, but did not live in the house. He was very attentive to the wife, and she complained to a female friend living in the house "that he teased her." He went to town and returned—she made fresh complaints of his attentions; this female friend left the house "because he returned:" the wife came to town in the middle of December, 1799; but though it was pleaded she eloped, she did not come with the gentleman, nor was there any proof the journey was not taken with the husband's consent. In town she resided in lodgings taken for her by this person, and passed under a former name of her husband, but observed no secrecy. The gentleman visited her there frequently: the person, at whose house she was, not from his own observation, but from the reports of others as to her conduct, requested her to quit his house,—she moved in succession to the gentleman's house in town and country, was treated there as the mistress, her children joined her there, and a child was born at this gentleman's house on the 14th of September, 1800. The husband was in London from the 4th of February, for two months; during this time the wife was in the lodgings; access was not pleaded, nor was it proved.

An accoucheur of great eminence, engaged by the gentleman to attend her, deposed "that he thought the child was full grown, though he could not swear she had gone more than seven months and ten days, (from 4th February to 14th September.\*)" There was no hostility at the time between the husband and wife—no complaints, nor any distress on his part at her conduct, though it was pleaded, that he heard of the adultery in December. No fact of adultery—no indecent familiarities were proved; there was no plea nor interrogatories on the part of the wife. Action: Judgment by default—Damages 8,000*l*.

The cause was appealed to the Arches, from the dismissal of the wife by the Judge of the Consistory Court of London; and the birth of two children subsequently was pleaded and proved.

#### JUDGMENT.

SIR WILLIAM WYNNE.

[After stating there was full proof of the adultery:]

It is for the Court to consider what has been the conduct of the husband; for, however culpable the wife may be, if he has been negligent and suffered her to form a connexion and live on the terms of cohabitation, here proved, with another man, she is not culpable towards him. Where there is so strong a case on the part of the husband, the Court has only to inquire, if he has done his duty; if not, the Court will not pronounce a sentence of separation. At Peterborough the husband and wife stopped for her to lie in: after a few days he returns into Scotland, and remains there several months. A physician proves that he was seized with an acute disorder, which confined him for several months: he had likewise business there: this may account for his absence from his wife, but not for her's from him: he did not send for his wife; it does not appear that he wrote one letter to her: he pleads that he knew nothing of her adultery till December,—how did this happen? there were many persons from whom he might—her mother, friends, and other acquaintance. What provision did he make for his wife in London? The lodgings were taken for her by the adulterer; the husband's children were sent to the adulterer's house: it does not appear, that the husband made any provision for her, and yet his circumstances would have enabled him. This is a total desertion of his wife. If this would be sufficient, what have parties to do but that the man should leave his wife, and that another man should take her for a time, and then that the parties should come to the Ecclesiastical Court and obtain a sentence? If, as I think appears here, the husband is totally indifferent to his wife, if she goes with another man—lives in his house as mistress of his family—has children by him (for all that is added in this Court, by the pleas, is, that she had had two other children since the former plea), I do think that the husband has, by his conduct, consented to her adultery; he is not, therefore, by law, entitled to a separation: and therefore, in this case, I cannot pronounce for such separation.

## GILPIN v. GILPIN.—p. 150.

To establish connivance, in bar to a suit on account of the wife's adultery, it is not necessary to show knowledge of, and privity to, the actual commission of adultery; such extreme negligence to the conduct of his wife, and such encouragement of acquaintance and familiar intimacy, as are likely to lead to an adulterous intercourse, are sufficient.

THIS was a suit brought by the husband against his wife by reason of adultery. The libel—after pleading the marriage on the 29th of December 1793, and the birth of four children, and that Mr. Gilpin, having, professionally as a surgeon, attended an officer in the army, introduced him into his family; after which, towards the end of the year 1801, he used frequently to visit at the house—charged three specific acts of adultery in the house of the husband, in January 1802: and that on the 29th of that month, the maid-servant in Mrs. Gilpin's presence informed Gilpin of his wife's infidelity; that she did not deny it, but quitted the house; and, in the afternoon of the same day went to Marlborough with the *particeps criminis*, where they cohabited till the third of February. Annexed to the libel was a letter, dated 30th of January (the day after her elopement), from Mrs. Gilpin to her aunt, in which was this passage—"You long ere now must have heard the dreadful news of my separation from the best of husbands, by my own infamous conduct."

The defensive allegation, in substance, pleaded:—1st, That in April 1801, Gilpin was of the age of forty-four years, the officer of the age of twenty-two, and Mrs. Gilpin of the age of twenty-four; that Gilpin seemed very desirous of promoting an intimacy between his wife and the officer, and frequently invited him to his house.

2nd, That the intimacy formed between Mrs. Gilpin and the officer was frequently the subject of conversation with Gilpin's friends; that he did not take any steps to check it, but was very desirous of promoting it, and was also very negligent of his wife; that he frequently requested him to call upon Mrs. G. when he, G., intended to be from home, and to write cards, and do other offices for her, and to walk out with her sometimes alone, and at other times in company, and to attend her to the public rooms and other places of public resort, when he, G., did not accompany her; and that in the husband's absence he was almost constantly with her.

3rd, That in August and September 1801, Gilpin generally slept at a lodging about one mile and a half from Bath, and several times asked his wife and this officer to accompany him there in the evening, and walk home alone, which they did.

4th, That in September 1801, Gilpin invited this officer to accompany him and his wife to Chippenham races; that, on their arrival, he left him and Mrs. G. to walk about on the race-ground, and while he G., was in the stand, he called out to this officer and desired him to give Mrs. G. his arm; and after the races desired his wife to show this officer the town of Chippenham, which she did; that they dined at the Angel Inn in a room up one pair of stairs, and afterwards he, G., left them alone together at the inn, saying, "I am going to call upon my tenant: you will take care of my wife."

5th, That in the beginning of 1802, Gilpin brought this action for crim. con. that the cause was set down for trial after Trinity term 1802,

but "Gilpin being conscious of the impropriety of his own conduct towards his wife, and knowing that he had been the cause of, and had promoted the intimacy between her and —, did, on the day preceding that on which the action was to be tried, withdraw the record, and that he and —, had since executed mutual releases to each other."

8th, that G., having so connived at the intercourse hereinbefore set forth, was barred from a separation.

The admissibility of this allegation was argued by:—

*Sir John Nicholl* and *Dr. Robinson* for the wife.

*Dr. Arnold* and *Dr. Laurence* for the husband.

JUDGMENT.

SIR WILLIAM WYNNE.

A libel has been given in this case pleading sufficient facts to entitle the husband to relief, and annexing a letter in which the wife admits her guilt, and speaks of her husband as "the best of husbands." This letter may be used at the hearing; but is not such as to preclude the defence now set up. What disposition the wife was in at the time she wrote it—what was the effect expected, the Court cannot say; but it is not a letter that will prevent the admission of this plea.

The present allegation, without admitting the adultery, charges the husband with such conduct as would avoid a sentence, even if adultery were proved. The plea is such as is often admitted, of negligence and encouragement on the part of the husband. Connivance is the word used. It has been argued that it must be such as to show knowledge of, and privity to, the actual commission of adultery: but that is not so. If there has been such extreme negligence to the conduct of his wife, such an encouragement of acquaintance and familiar intimacy as was likely to lead to the consequence that ensued—an adulterous intercourse—it would subject him deservedly to a refusal of the sentence he prayed. The relative age of the parties is not improper to be pleaded: the husband is older than his wife: that may lead to an obligation in him to exercise a more vigilant superintendence over her conduct.

It is alleged, that the husband frequently invited this man, an officer in the army, to his house, and promoted his intimacy with his wife. In the libel it is pleaded, that he became acquainted with him as a patient: but he did not so treat all patients; this is not an excuse. It is alleged that their conduct was observed, and became the subject of conversation; then, if the husband acted with the discretion which he ought, he must have taken some care. On the contrary, he appears to be, and was desirous of promoting the acquaintance: he was so negligent of, and inattentive to, his wife, as not to interfere in order to check but rather to encourage their intimacy. He sent letters inviting this young officer to his house, when he himself intended to be out. It is said, how can you prove this? You can prove the facts—that letters were sent; that the man came; that the husband was out, and from thence the Court would infer the intention. He was invited to walk out with Mrs. Gilpin, sometimes with others, sometimes alone. It was singular the husband should ask them to walk alone: the other part is not of so much weight. He was invited to go to public places, where the husband did not go: and the article concludes by alleging that this man was almost always with her, and the husband from home: this, if proved, will be very material, and will go far to establish the allegation, and what is relevant to the defence.

The 3rd article pleads an extraordinary fact, that the husband had a lodging near Bath, where he slept alone; that he asked his wife and this officer to walk with him there; and that they returned alone to Bath. This possibly may be explained; but it is extraordinary that he should have a lodging for himself alone, that his wife should not sleep there; and stranger, that he should leave this man to walk home with his wife.

The 4th pleads that they went together to Chippenham races. There is not much in that: but the article pleads, during this short trip, three different occasions on which the husband studiously took care that his wife and her paramour should be alone together. This was negligence, inattention, and encouragement likely to lead to the consequences which happened.

The 5th pleads, that the husband brought his action; and then, conscious of his own misconduct, withdrew it, and that mutual releases were executed. It is said, there might be other good reasons: if so, the husband may set them out: on the contrary, if the fact be that he had no other; but that he was conscious of his own misconduct, it may bring out what is material; he must give his answer to it. The fact is very striking.

I admit the allegation. (a)

*Note.* Shortly after the admission of this allegation, the cause determined by the death of the husband.

(a) In *Loader v. Loader*, on proof of the wife's guilt, the Court called for an affidavit from the husband explanatory of his delay to bring the suit; and, being satisfied therewith, pronounced the sentence. See also *Best v. Best*, 2 Phill. 161. [1 Eng. Eccl. Rep. 222.]

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## CAPEL v. ROBERTS AND NEELD.—p. 156.

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### *On Admission of an Allegation.*

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An allegation, on the part of the Executors, responsive to a libel in a suit of Subtraction of Legacy, and pleading circumstances *dehors* the will, is admissible to explain a latent ambiguity as to the object of the bequest; but the Court rejected the Testator's declarations to the drawer of the will, as inconclusive, and expressed a strong disinclination to their admission, in such a suit, under any circumstances.

THIS was a suit of subtraction of legacy brought by John Capel, Esq. treasurer of the city of London Lying-in Hospital, against the executors of the will of the late Philip Rundell.

The testator, by his will, gave 200*l.* sterling to the treasurer for the time being, of various charitable institutions, to be applied to the purposes of the respective establishments; and, among them, he enumerated "the Lying-in Hospital in Aldersgate Street, London:" and the fourth article of the libel pleaded,—"that the city of London Lying-in Hospital, Old Street, City Road, was formerly situate in Aldersgate Street, London, and was called 'The City of London Lying-in Hospital:' that subsequently the said Hospital was removed to the corner of Old Street, City Road, bordering on Aldersgate Street, where it carries on its charitable purposes, and is now called 'The City of London Lying-in Hospital:' and that there neither now is, nor ever was, any other Lying-in Hospital in Aldersgate Street, London, save the one which removed, as aforesaid, and to which the testator subscribed during 1818-19-20-21-

22. The article further pleaded the identity of the hospitals, and that Mr. Capel was the treasurer, and, as such, a legatee."

The executors gave in their answers to the libel, and they admitted "that the City of London Lying-in Hospital, Old Street, City Road, removed from Aldersgate Street in 1773; but denied that the present building was bordering on, or contiguous to, Aldersgate Street, for that it was more than a mile distant; they admitted that there was not now any Lying-in Hospital in Aldersgate Street, but denied that there never was any other such establishment save the City of London Lying-in Hospital therein, for the respondents said, that for some time after the removal of the said hospital from Aldersgate Street, the hospital now called by the name of the 'General Dispensary in Aldersgate Street,' carried on its charitable purposes as a Lying-in Hospital, although it had now ceased to do so: and that they believed that the testator, by the words "the Lying-in Hospital in Aldersgate Street, London,' intended the hospital called "The General Dispensary in Aldersgate Street;" and to which the deceased was an annual subscriber, as well as an occasional donor, from 1786 to his death, and to which hospital during that period he constantly sent patients, and in the welfare and management whereof he greatly interested himself, and that the respondents have paid the legacy in question to the use of the said dispensary."

An allegation, responsive to the libel, pleaded, on the part of the executors, in substance:—

1. That the testator, from 1786 to his death, was an annual subscriber to, and also a life Governor of, the General Dispensary, Aldersgate Street, London; frequently sent patients to it, interfered and voted in the election of the officers, and greatly interested himself in its concerns; and in 1817, having sent a greater number of patients thereto than usual, presented to it an additional donation of 20*l*. That the hospital was instituted in 1769, and had ever since been carried on upon the site of a building on which a lying-in hospital had been.

2. That the testator first came to London in 1769, about which time a certain hospital was removed from Aldersgate Street to a building erected for that purpose in the City Road, (next adjoining to St. Luke's Hospital, to which the testator by his will, gave 200*l*., by the description of St. Luke's Hospital, in Old Street Road), and hath ever since been, and is now called "The City of London Lying-in Hospital," and "The City of London Lying-in Hospital, City Road;" that it is not bordering on, or contiguous to Aldersgate Street; but is five furlongs distant from it, and seven furlongs distant from the site on which the hospital formerly stood: that the testator never sent any patient to, nor interfered in the concerns of the hospital; and in 1822 discontinued his subscription, and never afterwards resumed it.

3. Exhibited a printed book of the concerns and purposes of the hospital, published by authority of the Governors, in 1827; and alleged, that in the title page, the hospital is designated "The City of London Lying-in Hospital, City Road;" and that in the 16th page, wherein directions are given to persons inclined to benefit the hospital by will, it is described by the same name.

4. That the testator intending by his will to give among other charitable bequests, 200*l*. to the "General Dispensary, Aldersgate Street," gave to Mr. Coles, his solicitor, written instructions for the same, and a list of the various legacies: that in such instructions all the charitable

institutions which the testator intended to benefit by will, were respectively described by their local situation; that the solicitor on that occasion read the instructions to the testator, clause by clause; [that on coming to the bequest of 200*l.* to the hospital described in the instructions, as "The Lying-in Hospital, Aldersgate, London;" the testator said, "Yes, the hospital in Aldersgate Street:"]<sup>(a)</sup> that a draft of the will (executed) was afterwards approved of by the testator: that by the "The Lying-in Hospital," &c. the testator meant "The General Dispensary," &c. and that the executors had so accordingly paid it.

5. Recited part of the 4th article of the libel, and pleaded: that an institution called "The City of London Lying-in Charity," had since 1815 been, and is now carried on, in Aldersgate Street, and that application for the payment of the said legacy, was, before the commencement of this suit, made on behalf of such institution, and also of another Lying-in Hospital, now situate in Knight-Rider Street.

6. A correspondence, in respect to the said legacy, commenced by a letter from the then Secretary of the City of London Lying-in Hospital, City Road, to the executor, Neeld, and answered by Coles on the 1st August, 1827; also a further letter from Coles, on the 9th, mentioning the payment of the legacy, and the reasons generally, that enabled the executors to fix upon the hospital; also a letter, dated 28th August, 1828, addressed by Coles to the Committee of the City of London Lying-in Hospital, City Road, stating, that from the testator's instructions, as well as from oral explanations, there was no doubt as to the meaning and intention of the testator; it further pleaded, that, in conversation, Coles had explained the reasons to Mr. Capel.

7. Exhibited the original letters of the Secretary, and copies of three letters from Coles.

*Lushington* and *Dodson*, in objection to the allegation.

The three first articles are admissible, but the fourth introduces declarations to construe a written instrument: this is guarded against by the statute of frauds, and does not come within the exception stated and explained by *Gibbs*, C. J., who, in delivering, in the House of Lords, the unanimous opinion of the Judges, says, "The Courts of Law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances." (*Doe dem. Oxenden v. Chichester*, 4 Dow. 65.) There is a wide difference between allowing facts explanatory of an ambiguity, and declarations: if there were a latent ambiguity, facts in respect to either institution might be admissible, but declarations of what the testator said at the time the will was prepared cannot be received as evidence. There is a material distinction between an hospital and a dispensary. In the fifth article, an application by other institutions is pleaded; but that does not bear upon the question. The correspondence is inadmissible. The jurisdiction exercised by the Ecclesiastical Court in these suits for legacies, is very convenient and summary; it avoids the necessity of resorting to Chancery, where the numerous parties and the nature of the proceedings occasion a much larger expense and delay, than are produced by the simple and expeditious remedy afforded by these Courts. It is

<sup>(a)</sup> The part in brackets, and the 6th and 7th articles were ordered to be expunged.



therefore very desirable to keep the pleadings within the smallest possible compass.(a)

The *King's Advocate* and *Nicholl*, contra.

This is not a question in a Court of probate, but in a court of construction: the inquiry is not as to the factum of the instrument, but as to the meaning of a clause in it; and, in a court of construction, parol evidence is admissible, and is only admissible when the ambiguity is latent. What is the case here? There is nothing of ambiguity on the face of the will itself; and that any such ambiguity exists, only appears from dehors the instrument, viz. from the fact that there is no institution which answers in all respects the testator's description. The existence of this ambiguity is admitted by the manner in which the other side have shaped their case. The libel stated, that by the hospital, described in the will, the testator meant the Lying-in Hospital in Old Street: the claimant, therefore, admits that the description would not, of itself, and without explanation, carry the legacy to this or any other existing institution, and has undertaken to show that the testator erred in the local description of the hospital he proposed to benefit. The latent ambiguity thus admitted to exist, is sought to be explained by extrinsic circumstances: this explanation may be repelled in the same way; and accordingly, the present allegation pleads, in reply, facts showing that it not only was not likely that the testator should give a legacy to the claiming hospital, but it assigns reasons—among others, the deceased's declarations—why it was probable that he intended to benefit another institution to which the legacy in question has been paid.

It is admitted that facts, to show intention, are pleadable as explana-

(a) The jurisdiction in personal legacies belongs to the Ecclesiastical Courts. (See *Reynish v. Martin*, 3 Atk. 333. 2 Roper on Legacies, (White's edition) 691, and the cases there cited; and *Barker v. May*, 9 B. & C. 489. See also *Norris v. Hemingway*, 1 vol. 4, in *notis*. (1 Eng. Eccl. Rep. 12.) But the simple mode there pursued of enforcing payment is but little known. This jurisdiction is exercised by the Arches Court in cases of all wills proved in the Prerogative Court, and by the Official Principals of each Diocese, in cases of wills proved in the Diocesan Courts.

The course of proceedings in the Arches Court is usually as follows:—The executor being cited to answer the legatee in a suit of subtraction of legacy, a short libel is brought in, pleading that A. B. made a will, that he thereof appointed C. D. executor, and is since dead, leaving bona notabilia, and without revoking or altering his will: that, since his death, C. D. has proved his will in the Prerogative Court of Canterbury, that by his will A. B. left a legacy to E. F. in the following terms, [the clause of the will containing the legacy is here recited], that this legacy remains unsatisfied, and that C. D. is possessed of, and has admitted assets; has been applied to and refuses payment; and further pleads the identity of E. F. and the legatee, and that he is of age; and the libel concludes with a prayer that the executor may be compelled to pay the legacy, and be condemned in costs. The records of the Prerogative Court prove all the facts, except the assets, age, and identity of the legatee, and the executor is, upon the libel being admitted, assigned to give in his answers. Should he, in his answers, deny assets, or the legatee's identity or age, witnesses may be examined. Sometimes, as in the case in the text, there may be some special circumstances stated in the libel, and the executor also may plead responsively; but in a great majority of cases, the legacy is paid either as soon as the citation is taken out, or as soon as the libel is admitted. From the early stage in which these suits usually terminate, they pass, in a great degree, sub silentio, and are thus generally supposed more rare than is really the case. Of late they have, it is believed, become more frequent than they were a few years since. Sometimes, as a preliminary proceeding, an inventory and account is called for in the Prerogative Court.

The Bill for establishing local Courts proposes that those Courts should be entrusted with a jurisdiction for the recovery of legacies, in which the course of proceeding would not be very dissimilar from that above detailed; but possibly, if the extremely simple, cheap, and expeditious jurisdiction, now exercised by the Ecclesiastical Courts in this class of cases, were more generally known—still more if it were extended to the recovery of legacies charged on the realty—the want of any further remedy would not be felt.

tory of a latent ambiguity; but it is denied that the deceased's declarations are. In *Thomas v. Thomas*, however, Lord *Kenyon* said—declarations at the time of making a will were admissible to explain a latent ambiguity. (a) That there are four different institutions which have claimed the legacy, all of which assert that the terms in the will apply to them, is a circumstance in itself against this demand: and the onus to establish a particular and exclusive claim is on the party asserting that claim. It is always pleaded in libels for legacy that demand of payment had been made on the executors, and resisted. The correspondence is annexed, as responsive to this, and explanatory of the refusal, and may affect the question of costs.

#### JUDGMENT.

SIR JOHN NICHOLL.

This question is in respect to a legacy which has already been paid; and the only point is, whether it has been paid to the right party. The Court is disposed to enter more fully into the case, as perhaps its observations may prevent a charitable hospital from a waste of its funds, and from exposing itself to costs.

It is a suit for substruction of legacy brought by the Treasurer of the London Lying-in Hospital against the executors of the late Philip Rundell. The libel pleaded the clause in the will by which the legacy was given. Among a variety of legacies to different charities, the legacy demanded is in the words following—"The Lying-in Hospital in Aldersgate Street, London." The heading of the libel describes the institution for which the legacy is claimed, as, "The London Lying-in Hospital, formerly the Lying-in Hospital in Aldersgate Street:" and the fourth article more fully describes its history and the testator's connexion with it. By thus pleading, the plaintiff seems to admit that the words of the will, without circumstances dehors the will, would not carry the legacy to the hospital for which it is claimed. The will is dated in 1827, five years after the testator had ceased to subscribe to this institution; and the allegation now offered pleads that the charity, claiming this legacy, is not the charity described or intended by the testator in his will. [The Court here shortly stated the substance of the allegation.] The three first articles are not objected to: but a question is raised whether the parol declaration, pleaded in the fourth article is admissible. The Court would be very cautious in admitting such an article for the purpose of explaining what the deceased intended. If such a course be open to the one side for the purpose of explaining this ambiguity, it is also open to the other in order to show that the testator meant not the Dispensary in Aldersgate Street, but the Hospital in the City Road. The will speaks for itself, and the declaration does not carry the matter further. The expression still is "Hospital," not "Dispensary:" and I do not know whether assistance to lying-in women does not come within the objects of a general Dispensary. I am, however, very strongly disinclined, without further consideration, to make a precedent of introducing declarations between the testator and the drawer of his will. There may be circumstances, as where they are the only evidence, and where they are direct and stringent, in

(a) 6 T. R. 671. 1 Phillips on Evidence, 519. "It seems to be now settled, that all conversations and declarations of testators will be received where parol evidence is admissible, whether made before, at the time, or after the making of their wills, but with different degrees of weight and credit." 1 Roper on Legacies, 155. (White's edition) citing Lord Eldon in *Trimmer v. Baynes*, 7 Ves. 508.

which it might possibly become the duty of the Court to admit declarations; but, in the present instance, they do not alter the case: the question still remains, whether the testator meant the General Dispensary in Aldersgate Street, or this Lying-in Hospital which was formerly situate there, but which is now removed. The fifth article is in some degree contradictory and explanatory of the libel; but yet not directly so, because the title of the institution now existing in Aldersgate Street is "*Lying-in Charity*," not "*Hospital*."

The two next articles, pleading the correspondence, appear irrelevant; or, at all events, are unnecessary. The sole question is, the intention of the testator in giving this legacy. I cannot think this correspondence can tend to show what was the opinion of the testator: it tends to show the opinions of the executors, but not of the testator. It is, indeed, chiefly relied upon as bearing on costs: and also as explanatory of the conduct of the executors: but that requires no justification; no one will impute to them that they are acting otherwise than quite properly. The party suing must make out his case.

The sole question then is, whether the legacy is given to "The City of London Lying-in Hospital, City Road." That institution comes not within the words, neither by name and title nor by locality; neither by the beginning nor by the end of the description. First, as to the name and title, or beginning of the description. The legacy is not given "to the City of London Lying-in Hospital," which is the description of the claimant; but to "the Lying-in Hospital," which would apply as well to any other charity for lying-in women—of which there are several. Secondly, as to the locality, or end of the description: it is not "the City Road," but "Aldersgate Street." An attempt is made in the libel to remedy this by stating that about sixty years ago the City of London Lying-in Hospital was carried on in Aldersgate Street. That was about or before the time that the testator came to London: and, on that account, he was not likely to make a blunder in its locality. On the other hand, the site of the Dispensary having formerly been a Lying-in Hospital, it is likely enough to have retained the name of a hospital, or the Lying-in Hospital, though the correct name was the General Dispensary. The deceased, then was much more likely to mistake as to its title than as to its locality: and from the description alone, the probability is in favour of the locality, and that the legacy was not intended for the City of London Lying-in Hospital in the City Road, but for some institution in Aldersgate Street.

The extrinsic circumstances are more decisive. In support of the claim of the Hospital in the City Road, it was thought necessary to plead, that the testator had subscribed to that institution from 1818 to 1822. This, standing alone, is rather unfavourable then otherwise, for the subscription was discontinued for five years before the will was made. He probably subscribed from some temporary considerations, but his withdrawing, when possessed of immense wealth, shows that he thought the institution did not want funds, or was no longer entitled to his support; and it is expressly pleaded, that he never interfered in its concerns, never sent patients there, and never resumed his subscription: but, on the other hand, looking to his connexion with this institution in Aldersgate Street, he was an annual subscriber for forty years,—a life governor—sent a number of patients—made an additional

donation in 1817, because he had sent an unusual number of patients, and took an interest in it by attending the election of its officers. All these circumstances then, tend to show, that he meant that institution; and though he was mistaken in the exact title, he was accurate in describing its locality.

The testator has enumerated in his will no less than fifteen charities to which legacies of 200*l.* each are given, and he is very particular in describing each by its locality, however well the institution may otherwise be known. It is, therefore, very improbable that he should mistake the locality of the charity he intended to benefit, and describe it in Aldersgate Street (where he had never known it) when it was in Old Street, City Road, which is at some distance, particularly when he left a legacy to the hospital, next door to it, by the description of St. Luke's Hospital in Old Street Road. It is equally improbable, or still more so, that he should omit altogether this charity in Aldersgate Street which he had so much supported, and about which he had so greatly interested himself for forty years, and to the time of his death. I feel satisfied that the testator intended to give this legacy to the General Dispensary in Aldersgate Street, notwithstanding the objection arising from the mistake of the name. But the executors are not bound to prove for whom the legacy was intended: it rests with the other party to show that the institution, for which he claims, is entitled.

The allegation, excepting the parol declarations in the fourth article, and the whole of the sixth and seventh articles—which I direct to be expunged—is admissible; and I may venture now to say, that if the facts stated in this allegation, thus reformed, were proved, I should pronounce against the application. If the party stops here, the executors probably will not press for costs, to which they would be entitled if the cause was persisted in.

Allegation to be reformed.

*Note.* The proceedings were discontinued.

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### The Office of the Judge promoted by LEE v. MATTHEWS.—p. 169.

Brawling and smiting, at a vestry attended only by five persons, and held in a room situate within the churchyard, are, *ratione loci*, offences within the stat. 5 & 6 Edw. 6, c. 4, though of a very slight ecclesiastical character. In such a case—where the Promoter, a private individual, was proceeding vindictively, and had in the articles exaggerated the smiting, and suppressed his own brawling expressions, which provoked the smiting—the Court directed the matter to stand over for private arrangement; but, that failing, on a subsequent day pronounced the brawling and smiting proved, decreed the defendant to be suspended *ab ingressu ecclesie* for a week for brawling, and to be imprisoned 24 hours for smiting, and ultimately condemned him in costs.

The Minister has, in the first instance, the right to the possession of the key of the church, and the church-wardens have only the custody of the church under him; if he refuse access to the church on fitting occasions, complaint must be made to higher authorities.

Where the office of the Judge is promoted, the whole transaction should be fairly stated in the articles, in order, first, that the Judge may consider whether he ought to allow his office to be promoted, and secondly, that the defendant may be enabled, without injustice to himself, to give an affirmative issue.

The Office of the Judge promoted by FIELD v. COSENS.—p. 178.

A defendant, on giving an affirmative issue, suspended *ab ingressu ecclesie* for a month, and condemned in costs for brawling on two occasions at a vestry held in the chancel.

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TAYLOR v. MORSE.—p. 179.

*On Appeal.*

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A respondent may be admitted as a pauper in the Court of Appeal; and the Court looks at his *faculties* at the time of his application, not at what he may have been possessed of at a former time.

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## PREROGATIVE COURT OF CANTERBURY.

LILLIE v. LILLIE.—p. 184.

The law presumes *prima facie*, 1st. that if a paper (a will) be left at a party's house, it comes into his possession: 2dly, that if it be thus traced into his possession, and be not forthcoming at his death, he destroyed it. A draft will being propounded under these circumstances, the Court pronounced the deceased was, as far as appeared, dead intestate, and condemned the party setting up the paper in costs.

THIS was a cause of proving in solemn form of law, a draft of the will of Charles Edward Lillie, deceased: the will was alleged to have been destroyed without his privity or consent. The draft was propounded by the mother of the deceased, and opposed by his widow.

*Lushington* and *Nicholl* in support of the draft.

*Dodson* and *Addams* for an intestacy.

JUDGMENT.

SIR JOHN NICHOLL.

The instrument set up in this case, is a draft of the will of Charles Edward Lillie: the will itself being alleged to have been destroyed without his privity or consent. The fact that the deceased executed such a will is proved; but, as it is not forthcoming, the party setting it up must satisfy the Court (a) that it was not destroyed *animo revocandi*, by the deceased; as, for instance, by showing that he had no opportunity of so doing, (b) or that it had been lost, or destroyed, without his privity or consent.

(a) Not by evidence amounting to positive certainty, but only such as reasonably produces moral conviction. *Davis v. Davis*, 2 Add. 226. [2 Eng. Eccl. Reps. 277.] *Colvin v. Fraser*, Vol. II. 325. [4 Eng. Eccl. Reps. 113.] For the acts, declarations, conduct, and affections of the deceased may raise such an extremely strong improbability, almost amounting to an impossibility, of his having himself destroyed the will, *animo revocandi*, as to rebut the *prima facie* legal presumption, and to compel the Court to conclude that the deceased, at the time of his death, believed the will was in existence, and would act upon his property; and consequently that its non-appearance was the result of some cause other than the wish and intention of the deceased. This was the principle of the decision in *James v. James* (an amicable suit), Prerog. Hilary Term, 1829, wherein an executed fair copy was pronounced for; the will itself, though it was known to have been in the deceased's possession, not being found on his death. The facts, proving adherence to the last moment of his life, were quite irresistible.

(b) Thus, if the will is traced out of the deceased's possession and custody, it rests with the

The deceased died on the 28th of October, 1828, leaving a widow, a mother, a brother and a sister. Not only was his marriage with Anna Goldsmith (which took place on the 5th of September, 1827), disapproved of by his mother and family, but they objected, on account of his circumstances, to his marrying at all. Soon afterwards he had a violent attack of illness, and in October sent for his friend Mr. Whitmore, a stockbroker, to whom he gave instructions for his will. Whitmore employed his own solicitor: the will was duly executed, and was deposited by Whitmore at his banker's. Whitmore and two other friends were appointed trustees and executors.

This will was not favourable to his wife, and it was executed without her privity or knowledge of its contents. His property consisted of a freehold house and of about 3,500*l.* personalty. The house was devised to the mother for life, and then to the brother: he gives to his mother an annuity of 100*l.*, and to his wife the interest of the residue, and that only during her widowhood. Now this interest at 4 per cent would not exceed 40*l.* a year. He also gave her some contingent interest after the death of his mother.

The reason suggested for this disposition was, that she brought him only 500*l.* as her fortune,—that this was too slight a portion,—that her father ought, and was fully competent, to provide for her; and therefore, though at the altar the deceased had endowed her with all his worldly goods, he intended to throw the onus of her maintenance on her own father. But as a professional man he must have known, that having accepted the portion given with his wife, he was bound to support her. If any credit be due to the deceased's declarations, he believed his mother and brother had used means to give him, while on the bed of sickness, unfavourable impressions of his wife; and there are circumstances which tend to confirm the sincerity of his belief, whatever foundation it might have had in reality. Taking, however, the simple fact, that the will—made only two months after marriage,—when he was dangerously ill,—was so adverse to his wife, is it highly improbable that he should revoke it?

That the wife showed him great attention during his first illness is not denied, and the subsequent history of his own conduct prove that he became greatly attached to her. He went with her to reside at Tottenham: he went with her on tours; he resided for some time with her at her father's house, but they never went to reside with his mother. His ill state of health continuing, his wife was a constant and vigilant nurse, and his great anxiety was, lest by her attention to him she should injure her own health. Looking, then, at this history, nothing could be more improbable than that he should suffer this will to stand.

In addition to this conduct there are various confidential conversations and declarations that he would revoke it; but it is said, that he did not intend to die intestate; and it is true that he might propose to make another will. There is, however, a declaration, "that the law would make his will in a manner that would be quite satisfactory to him." What would that be? His brother would take the small freehold; his widow would take a moiety; and the other half would be

other party, either to show by the same sort of evidence that it came again into his possession or custody, or that it was destroyed by his directions, or with his privity and consent. *Colvin v. Fraser*, Vol. II. 327. [4 Eng. Eccl. Reps. 113.]

divided between his mother, brother, and sister : and the deceased himself, being a solicitor, must have been aware that the law would thus dispose of his property. An intestacy therefore, in this case, is not improbable : and is quite consistent with a continuance of affection for his mother, brother, and sister, though not with its continuance to the same extent, and to that exclusive degree as when he made this will. The probability then is, that he would revoke and destroy this will.

On the other hand, what evidence is there to show the impossibility of such destruction by himself? None. It should at least be shown, that no opportunity for it occurred : but the evidence bears all in an opposite direction. It appears from the deposition of Mr. Whitmore, (against which and against whose credit and character there is not the slightest imputation), that though, as the deceased's confidential friend, he had been employed in preparing the will, while the deceased was ill, he did not agree in or approve of the disposition ; and therefore when the deceased recovered from the violence of the attack, Whitmore fetched the will together with a codicil from his banker's and inclosed them, and the Solicitor's bill for preparing the will, in an envelope, and called at the deceased's house to deliver the packet to him. The deceased being at dinner or lying down, Whitmore left the papers at the house, either with the female servant or with the clerk, but with which of the two he does not recollect ; nor has the servant, nor the clerk (both of whom were in the habit of receiving parcels and messages), an exact recollection of Whitmore's leaving this particular parcel : but there is no reason to doubt the accuracy of that gentleman's evidence ; and then the presumption from the will being left at the house is, that it came into the deceased's possession. Here, therefore, the paper is traced back to the possession of the deceased, under circumstances which raise a strong probability that he would destroy it.

That the deceased himself did destroy it there is no direct legal evidence : but the widow, in her affidavit of scripts, swears, that the will was delivered to, and that then it was torn and burnt by, the deceased. She did not even know the contents ; but only the fact that it was burnt, and this is no after-thought, for she mentioned the circumstance in the deceased's life-time. She has therefore purged herself by her oath that it was not she, but the deceased himself who destroyed these papers.

Looking, then to all the circumstances—to the contents of the will itself—to the time and circumstances under which it was made—to the subsequent conduct of the deceased—to his very great affection for his wife—to his various declarations—to the positive evidence of Whitmore that he had carried back the will together with the Solicitor's bill,—and—to what I have hitherto omitted to mention—the admitted fact, that the deceased himself called to pay the bill, and though he had not the bill with him, yet that he knew the amount, I am of opinion, not only that there is no proof that the will was destroyed without the deceased's privacy, but I am morally convinced that it was destroyed by the deceased himself : it is not necessary to prove that ; for the fact, that the will was left at the deceased's house, is, as I have said, sufficient presumptive proof that it came into his possession ; and it is not attempted to be denied that, if traced into his possession, the law *prima facie* presumes that he destroyed it ; (a) and, in this case, that presumption is strength-

(a) In the case of *Pinhallow v. Robinson*, administration of Pinhallow, as dying intestate, was granted to his nephew, Robinson : he was called by Pinhallow to show cause why it

ened by the parol evidence of his declarations, and of his increased attachment for his wife.

should not be revoked, who offered an allegation propounding the draft of a will; that the deceased gave instructions to Mills, which were written over and executed by him; that soon after the execution of the will he went into Cornwall, and there declared, on the Thursday before he died, that he had made his will, and that it was at London; that he had made his kinsman, Pinhallow, his executor, and that "he will be the Squire now;"\* that since his death the will could not be found.

*Per Curiam.* (Dr. Bettesworth.)

If the will had been found cancelled, it might depend on circumstances how it came in that state; and, if any declarations near the time of the testator's death, it might be presumed to have been done by the person prejudiced by it. It will lie on the other side to show that the deceased departed from his intentions, in order to lead the presumption that he cancelled it.

*Allegation admitted.*

The instructions and execution were proved, but it did not appear how the will was lost, and that the deceased was privy to Mills having preserved the draft. The original will, which had been left with Mills, the writer, was taken out of his hands by Pinhallow, when he was going into the country; but there was no account of it afterwards. The declarations of the deceased, relating to his will, were not uniform—some, that he had no will.

*Per Curiam.*

The question in law is, whether it is necessary that the will should have been seen after his death, and whether the law presumes, if there be no account of a departure from his intention, that it has been lost by misfortune: *If it does not appear, it must be supposed to have been destroyed by the deceased himself, unless there were stronger presumptions on the other side.*

*Pronounced to die intestate.*

The presumption in the case of cancellation was thus held in the following case, similar in some respects to *Colvin v. Fraser*, (Vol. II. 325,) [4 Eng. Eccl. Rep. 113.]

#### BOUGHEY v. SIR WILLIAM MORETON.

Cancellation of one duplicate a cancellation of both. In deceased's custody, must be presumed to be cancelled by deceased.

Lady Moreton, in pursuance of power on marriage, executed two duplicates of will; one she kept, and the other was left in the hands of an executor. Soon after her death, that in her custody was found cancelled, in a trunk, with other papers, her seal, name, and entire attestation of witnesses, torn or cut off. Sir William swore he believed she cancelled it herself, it being found, upon the search, in the state it now is, which was the first time he ever saw it. This cancelled and uncanceled duplicate being brought in, the matter was brought before the Court, to determine whether probate should be granted to Boughey of the uncanceled duplicate, or administration should be granted to Sir William, as husband.

The Court was of opinion, that a cancellation of one duplicate was in law a cancellation of both; and that as the cancelled duplicate was found in her custody, and it did not appear that any other person had access to it, it must be presumed the deceased cancelled it herself: therefore refused to grant probate to Boughey, as prayed, upon the evidence now before the Court, but gave time to the next Court, to determine whether he would propound the uncanceled duplicate, or would undertake to prove, either that the other part was cancelled by some other person; or, if by deceased, that she did it inadvertently or accidentally, and not *animo cancellandi*; otherwise, the Court decreed administration to her, as dying intestate, to be granted to Sir William, as husband.

So in the case of *Hare v. Nasmyth*, before the House of Lords, Lord Chancellor Eldon said—"According to all principle, if a paper, cancelled, and the seal cut off, or the name erased, is found in a fast locked place of the testator, the *prima facie* inference from that is—not that the testator meant it should continue to be his will, but that the testator was the person that did that act himself, which is found to be evidenced by the state of the paper found in his fast-locked closet." Vide 1 Shaw, 73. S. C. 2 Add. 25. a. [2 Eng. Eccl. Rep. 206.]

Again: "I am satisfied that the seal was taken away by excision; and it appears to me also, that this excision is *prima facie* to be taken to be an excision by his own act; and that, according to the principles which you apply to cases of this sort, the circumstance that it was found in his own custody, and in a place of security, and with this excision, is to be taken as evidence that it was his own act." Ibid. 77.

But it is believed that the presumption, when a testamentary paper is not forthcoming on the death of a party, and no evidence be given of its destruction by the deceased, or by any other person, has never been ascertained by a judicial decision in the Courts of Westminster Hall;

\* The real estate was likewise devised to him by the will; but he was neither his heir at law or next of kin.



The only difficulty is to find out some fair grounds to justify the mother in setting up such a case. All the facts were fairly communicated to her, and to her friends and advisers. There was no appearance of mystery nor of concealment. The executors were satisfied that the will had no existence either in fact or law; nay, there was the widow's affidavit, directly stating that the deceased had burnt it. In opposition to this, the mother chose to set up a case of spoliation against some persons. It is true that no person is directly fixed upon against whom the charge of spoliation is made: but on whom must the imputation attach? Though, however, she does not directly charge spoliation, she, at all events, by necessary implication imputes to the widow perjury in her affidavit of scripts and answers, wherein she swears, "that she saw the deceased burn a paper, saying 'he wished he had never made it;' and that while it was burning she read the words, 'This is the last will and testament.'" The engrossed copy, which is before the Court, has the words, "Last will and testament," in a large text hand, and thus strengthens the widow's affidavit. The mother, brother, and sister, are entitled to one-half of the personalty, and I think it more just that the expenses incurred in this suit should fall upon the mother, the party in this cause, than that any part of the costs should fall upon the widow in diminution of her share of the effects.

I therefore pronounce against the instruments propounded; that, as far as appears, the deceased is dead intestate; and I condemn Mrs. Christiana Lillie, the mother, in costs.

however, it seems probable that those Courts would be guided by the principle acted upon in the Ecclesiastical Courts; for in *Moggridge v. Thackwell*, 7 Ves. 79, Lord Chancellor Eldon thus expresses himself:—Lord Thurlow in referring to the case of *The Attorney-General v. Siderfin*, does not take notice of the circumstance, that though there had been an appointment, it might have been revoked; and the non-existence of it was prima facie evidence of that fact, that it was revoked."

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### AITKIN v. FORD.—p. 193.

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#### *On Motion.*

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Administration, as to a creditor, decreed to the mother of an intestate, advanced by her; the father, though alive, having been divorced *a vinculo matrimonii* and married again. The Court, before granting administration to a creditor, requires an affidavit, (inter alia,) that he has no other security; and if the person first entitled to the grant is abroad, and the service of the decree is on the Royal Exchange, that such person has no agent in this country.

GOSTLING moved for letters of administration, on an affidavit, the substance of which is as follows:—Catherine Aitkin of Weymouth, single woman, made oath: That Charles Ford late of Trinidad, a Lieutenant in H. M. first Regiment of Foot, died on the 1st of April, 1829, a bachelor and intestate, leaving James Ford, his natural and lawful father, now residing in the United States of North America; that the deponent in 1804 was duly married to James Ford in Scotland; that in October 1817 she separated herself from him in consequence of discovering his adultery, and in 1820 obtained a decree of divorce in the Commissary Court of Scotland; which decree was affirmed by the house of Lords; and that James Ford had since married the woman with whom he had

been living in adultery: that the deponent, during the time of her marriage had, by James Ford her husband, ten children, of which the deceased was one; that from the time of quitting her husband in 1817, she had entirely maintained and educated her children from her own separate property; that in the purchase of two commissions in the army for the deceased, and in fitting him out, she had expended upon him 900*l.*; and that the same was now justly owing to her from the said deceased's estate; and that the only property thereto belonging in this country was about 120*l.* due from the War Office.

*Per Curiam.*

The decree, citing James Ford, has only been served by affixing it to the Royal Exchange: and the affidavit does not state that he has no agent in this country; nor that the party, applying for the administration, has no other security for the money with which she purchased the deceased's commissions: it is therefore deficient in these particulars; but when such defects are supplied, the administration may pass to Catherine Aitken. (a)

(a) The Court, before granting administration to a creditor, requires an affidavit of the amount of the effects, and of the debt, and that the creditor has no other security. Justifying security is called for at the Court's discretion, according to the circumstances of each case, save that there is one general rule, that in all cases where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required; and if the party first entitled is abroad, the decree must be served on the royal exchange and on his agent, or an affidavit must be made that he has no agent in this country.

When the property is large, and exceeds to a considerable extent the amount of the interest of the party applying for the grant, the Court—even where the party first entitled to the grant is abroad—sometimes requires to be satisfied that he has had notice of the intention to apply for such a grant, and frequently directs the matter to stand over till sufficient time has elapsed, since the service of the decree, for an appearance to be given.

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In the goods of MARY POWELL.—p. 195.

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*On Motion.*

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The Prerogative Court granted an administration, limited to assign a term in the diocese of A., the will of the deceased (who had no goods out of the diocese of B., except this satisfied term,) having been proved in the Court of B., and the chain of executors being subsequently unbroken.

*Semble*, that a diocesan probate can give no authority, nor continue any privity, as to satisfied term in another diocese.

WILLIAM POWELL by his will appointed his wife, Mary Powell, sole executrix and residuary legatee; and in 1775 she proved his will in the Prerogative Court of Canterbury.

Mary Powell by her will appointed her son, her daughter, and John Pocock, executors: and in 1784 they proved her will in the Episcopal Court of Gloucester. John Pocock survived his co-executors, and died in March 1819; and his will was proved by his wife, Jane Pocock, the sole executrix, in the Prerogative Court of Canterbury. She also made her will, and appointed Ann Watts and Reynold Gunter her executors, who in 1820 proved in the same Court.

In 1761 by indenture of mortgage, certain premises in the county of Somerset were assigned to Robert Powell, to be held to him, his exec-

utors, &c. for the remainder of the term of 1000 years, with the usual proviso of redemption. By an indenture of 1st January 1828, reciting that the claims of Robert Powell were satisfied, but that there had been no assignment of the term to the owners of the freehold, it was witnessed that Watts and Gunter, executors of Jane Pocock, and, as such, the representatives of Robert Powell, had sold and assigned the premises to John Hooper and others: that assignment, however, was considered insufficient, inasmuch as the term assigned was not within the Diocese of Gloucester, in which diocese Mrs. Powell's will was proved, and within which were all her effects, except the term stated to have been satisfied; and accordingly an administration, limited to the assignment of this term, was granted to the nominee of Hooper and others; but the purchasers still objected, on the ground that the term, whether satisfied or not, vested in Mary Powell as executrix of Robert, and they required that she should be represented by a grant from this Court to Watts and Gunter, the executors of Jane Pocock.

*Lushington*, under these circumstances, moved for a limited administration to Mary Powell to be granted to Watts and Gunter for the purpose of assising this term.

*Per Curiam.*

The property to be assigned is in Somersetshire: a probate therefore in the diocese of Gloucester cannot give any authority in respect to it. I have no difficulty in granting an administration limited to assign the term. (a)

Motion granted.

(a) See the case of *Fowler v. Richards*, 5 Russ. 39.

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## CROSLY v. The Archdeacon of SUDBURY and Others.—p. 197.

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### *On Petition.*

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The Court will not enforce a monition to transmit the original will proved in an inferior jurisdiction, where the deceased died, but will grant a limited administration to assign a satisfied term situate in another diocese.

Generally speaking, all ecclesiastical jurisdictions are limited in their authority to property locally situate within their district.

THIS question respected the enforcement of a monition served upon the Registrar of the Court of the Archdeacon of Sudbury to transmit to this Court an original will; and the grant of letters of administration (with the said will annexed) under certain limitations.

The Registrar of the Archdeaconry appeared under protest, denying the jurisdiction, and, in substance, alleging "that Thomas Underwood, the deceased, did not leave bona notabilia; that, save the residue of a term of 1000 years in certain premises in Essex, of which he was a mere trustee, and where no money was due, and which was of no pecuniary value, all the rest of his property was in the Archdeaconry of Sudbury where his will was proved by his executor in 1786; that the residue of the term of years was, at his death a satisfied term which had been assigned to the deceased merely to attend and protect the inheritance against mesne incumbrances, and was of no value as part of the deceas-

ed's property, could not be converted to profit, and therefore not bona notabilia;" and prayed to be dismissed.

To this petition it was answered:—"that by deed in 1771 between N. of the first part, R. of the second, and Underwood of the third, the premises were sold to Underwood, his executors, administrators, and assigns, during the remainder of 1000 years, then unexpired, in trust as there set forth; that Underwood died without having assigned such interest—made a will,—that probate was taken in the Sudbury Court, where the will remained; that the executor was dead and there was now no legal representative; that by sufficient conveyances William Taylor and James Hales were become entitled to the freehold and inheritance of the premises in question, and of the remainder of the term, but they could not make a legal title without a legal assignment of the remainder of the term by the representative of Underwood; that the premises being so situate in Essex, and the legal interest being in the deceased who had goods, as admitted, in the jurisdiction of the Court of Sudbury, they together formed bona notabilia so as to give jurisdiction to the Prerogative Court; that the term could not legally be assigned under any probate or administration from the Court of Sudbury, nor by any representation except from the Prerogative Court: that in December 1813, Crosley, as nominee of Taylor and Hales, prayed a monition to transmit the original will which has been duly executed; and now petitions that the protest be overruled and monition enforced."

*Jenner* and *Lushington* in support of the protest.

To prove a satisfied term forms bona notabilia, it must be proved that it is of some value; but, whatever may be the value of such trusts, it belongs to the freehold; they are of no pecuniary value; here the legal interest is in the trustee, but the beneficial interest in the cestui qui trust. *Maundrel v. Maundrel*, 7 Ves. 567; *Villars v. Villars*, 2 Atkins, 72. The trustee could neither sell nor dispose of it. If the term should be considered as forming bona notabilia, it would be attended with great inconvenience—the will must be transmitted, and the probate hitherto acted upon, would be void.

*Swabey*, and *W. Adams*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

The question assumes a very awkward shape, from the appearance in this case not being given by the party, but by the Judge of another jurisdiction asserting his own right in opposition to the right of this Court: it is awkward for this Court to have to decide on its own jurisdiction; but as this is cast upon it, the Court must endeavour to discharge the duty. I must first observe that jurisdictions are not established for the benefit of those who exercise them, but of the public who have occasion to resort to them. The emoluments of the Judges and registrars, and others connected with them, are a very secondary consideration: the primary consideration is the convenient administration of justice to the public.

The metropolitan has, under certain circumstances, the right to grant a Prerogative Probate, for this purpose;—that where the property lies in different jurisdictions parties interested may be saved the expense and inconvenience of resorting to more authorities than one. Now (except under very special circumstances.) (a) all jurisdictions are limited in their

(a) It appears, however, from the case of the *King v. Yonge*, D. D. 5 Maule & Selwyn, 119,

authority to property locally situate within their limits. The Archbishop to his province—the Bishop to his Diocese—the Archdeacon to his Archdeaconry. Here the property is not locally situate within the Archdeaconry of Sudbury, the jurisdiction where the party died, but in another jurisdiction and diocese.

There is an absolute necessity that acts should be done in respect to this property in which the rights of parties are interested, and which acts can only be done by the legal representative of the deceased quoad this property: it is quite clear that the Archdeacon of Sudbury cannot grant a representation sufficient for this purpose, because the property (whatever be its value, or if of no value) is not locally situate within his jurisdiction. It seems equally clear also to me that the Ordinary of the place, where the property is locally situate, cannot grant a representation because the deceased has left other property, above 5*l.* in value, in another jurisdiction, Sudbury. What then is to be done? Are the rights of the parties to be lost, and is no legal title to be made to this property? That cannot be. What other jurisdiction has authority but the Archbishop's to supply this deficiency? The representation then being necessary, and no other jurisdiction competent to grant it, I think, *ex necessitate*, that this Court, without inquiry as to the value, has not only jurisdiction but is bound to exercise it; the grant, however must be limited, and strictly limited, to the purposes prayed.

The next question then is, as to the mode of making the grant: and whether any and what arrangement can be made in that respect?

It is said, that the property is of no value; but the legal property was in the deceased, and his act, if living, would be necessary to make a title: and though, as a trustee, a Court of Equity would compel him to do such act, yet in law he is the proprietor. Still I should be sorry to hold, that these naked trusts in all cases create bona notabilia, which would make the grants of other jurisdictions null and void; and it might be an inconvenience to the parties beneficially interested in the property, to be obliged to take a prerogative probate, when a local jurisdiction might otherwise be competent; yet I suppose no conveyancer would be satisfied with a conveyance of property situate in one jurisdiction under an administration granted by the authority of another jurisdiction; for manifestly it would not be any conveyance, because the Archdeacon of Sudbury could not make any person legal representative quoad hoc—to make a valid title to premises in another jurisdiction. However, as an administration, limited to this particular purpose, is only prayed—not a general administration—the former grant will not be revoked, nor the other property of the deceased, nor his representatives, be thereby disturbed. I do not therefore see any substantial advantage in having the will transmitted.

The administration might as well be granted on an office copy, except that it has been the usual practice to have the original transmitted: but I am inclined to grant this administration without ordering the will to be sent up; and thus the probate will not be rendered void. A practice

that the Archdeacon of Sudbury has, by composition with the Bishop of the diocese, jurisdiction, with certain exceptions, over the effects of all persons dying within the archdeaconry, wherever such effects may be locally situate within the diocese. Of course the Bishop could only delegate such authority as he himself possessed, and therefore no grant from him could extend the right beyond the diocese; but, within the diocese, he has delegated to the Archdeacon his own authority, limited not by the locality of the effects, but only by the locality of the death.

prevailed, I understand, for two years, of granting such administrations without the will—or even a copy of it—why it was discontinued I do not know; but, in the present instance, I shall not enforce the monition for the transmission of the original will; and will reserve the consideration how the administration shall issue.

*Note.*—The administration, without any copy of the will annexed, limited to assign this term and sworn under 100*l.*, afterwards passed the seal.

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TAYLOR v. D'EGVILLE and BEBB.—p. 202.

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*On Admission of an Allegation.*

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Probate (as of a codicil) refused to a paper as not testamentary, though found in the same envelope as the will and a codicil, and explanatory to the executors of the nature and value of, and most advantageous mode of managing, the deceased's property, but having no dispositive or revocative effect.

WILLIAM TAYLOR in and by his last will and testament appointed James D'Egville and Joseph Bebb two of his executors; and on the 8th of June, 1825, they took probate of the same together with a codicil. A decree having issued, at the instance of George Taylor, the natural and lawful brother, (and, as such, one of the persons claiming the residue of the deceased's undisposed of personal estate) against the executors, they brought in a certain paper referred to in the decree, and alleged to be a second codicil to the deceased's will; but they declared that they would not take probate of it (*a*).

(*a*) The contents of the testamentary papers, as far as they affect the question before the Court, are here subjoined:—

"This is my last will and testament, written with my own hand, this fifteenth day of February, 1823. I hereby will and bequeath all the moneys that may come to me from the funds now in Chancery, arising from the sale of the Opera House in the Haymarket, for the purpose of paying all my just debts; and the surplus to be divided equally between the children of my brother Captain George Taylor. I also will and bequeath all my interest in the property boxes in the said Opera House [the testator then enumerated certain boxes] to Ann Dunn: and my will and request is, that the executors to this my last will shall let all the afore-described boxes for the said two years or opera seasons at the best rents, and out of the said rents to set apart, for the use and benefit of Ann Dunn, the sum of six thousand pounds."—The testator, after suggesting certain modes of investment for this sum, directs—"that Ann Dunn shall not have the power to assign or alienate any part of the 6000*l.* or of the income to arise therefrom during her lifetime, but that she shall have the power of bequeathing 3000*l.* thereof by will, and the remainder of the 6000*l.* is, upon her demise, to be equally divided between the children of my said brother, George Taylor."—Then, after some small legacies, the testator appoints executors, and dates and signs the instrument.

By a codicil, subjoined to the will, he directs, that "if by the assignment, during his lifetime, of the before-mentioned property boxes, the rents thereof shall not produce 6000*l.*, his executors shall make up the deficiency out of the rents of certain other property boxes, and divide the residue of the last rents of the said enumerated boxes, for the year 1825, equally amongst his said brother's children. Witness my hand again, this 15th day of February, 1823. Wm. Taylor."

There was no disposition of any surplus beyond the 6000*l.* that might arise from the rents of the first-mentioned boxes.

The paper propounded as a second codicil, was headed—

"Memorandum—London, 15th day of Feb. 1823.

"In reference to my last will and testament (of this date) I beg leave to observe, by way of instructions to my executors, that for 1824, I have bequeathed the centre box in the pit," &c. [the paper then proceeded to enumerate certain boxes, estimating his interest in them to be worth 8,150*l.*] "to secure the 6000*l.* bequeathed to Mrs. D." and after stating his tenure, interest, and

An allegation in support of the paper was given in on behalf of Taylor, the admissibility of which was now debated.

The substance of the allegation was as follows:—That the testator having a mind and intention to give further directions to his executors as to the administration, distribution, and management of his property, and more particularly as to the provision he had made for Ann Dunn, spinster; wrote the second codicil (pleaded and exhibited) and placed it in the same envelope in which the will and first codicil were enclosed, and deposited it with his other papers of moment and concern; and that by the letters "Mrs. D." was meant Ann Dunn named in the will. The hand-writing, finding, and identity of the paper were also pleaded.

*Addams* in objection to its admission.

The paper is in no part of it testamentary: it is a mere calculation and begins thus, "Memorandum." Whether the date refers to the day on which the paper was written or to the date of the will may be doubted. No sentence in it is expressed in imperative terms. The will is formal; and there is a codicil written on the same paper. If the residue is undisposed of by the will and codicil, there is certainly a disposition of the surplus rents for 1825.

*Per Curiam.*

Can the Court receive this paper unless testamentary? What part is relied upon to make it codicillary?

*Lushington* in support of the allegation.

A suit in Chancery is now pending as to the person entitled to the residue of the deceased's estate: the executors claim a large portion of the property as undisposed of, and the legatees and next of kin have filed a bill to ascertain the point, and they are advised that the paper, now propounded, will assist in showing that the deceased intended his executors to be trustees only, and not legatees (a). That this paper is testamentary and codicillary appears from these passages, "by way of instructions to my executors"—"It will therefore be advisable to try to make a bargain." The will seems to have been written by the deceased without assistance: the first codicil has no formal commencement; and the second codicil must, *prima facie*, be considered as written on the day it bears date—the same date as the will and first codicil. I admit that the testator may not have anticipated the probate of this paper, but the Court will consider it as testamentary, if it purports to affect the disposition of the testator's property even under the directions of the Court of Chancery.

*Per Curiam.*—Suppose the testator had omitted in this calculation some of those boxes which he has bequeathed by his will and codicil, would such omission be revocatory?

some considerations which would influence their value, pointed out that the boxes might be more advantageously disposed of to Mr. Ebers than to any other person; as in these terms—"It will therefore be advisable to try to make a bargain at an early period with Mr. Ebers." But there were no further words declaring for whose advantage these arrangements were to be made.

(a) The 1 Will. 4, c. 40, entitled "An Act for making better provision for the disposal of the undisposed-of residues of the effects of testators," provides, that "after the 1st of September, 1830, executors are to be deemed, by Courts of Equity, trustees for persons entitled to any residue under the statute of distributions, unless it appears by the will that such executors were intended to take such residue beneficially." sect. 1. The Act is not to affect the rights of executors, where there is not any person entitled to the residue under the statute of distributions; nor is the Act to extend to Scotland.

*Lushington.*—I do not contend that. But the paper is operative as explanatory: it is clear that by it the testator proposed to point out to his executors how the greatest benefit would accrue to third parties from his property. If the paper is excluded from probate, it will deprive the next of kin from making out their case against the executor. The paper was found in the same envelope with the will.

*Per Curiam.*—This paper does not appear to me to be at all testamentary: it is merely explanatory to the executors of the nature and supposed value of the deceased's property, and of the most advantageous mode of managing it. The paper has no dispositive nor revocatory effect. If the paper is not testamentary, the parties (especially when five years have been suffered to elapse since the testator's death) ought not to be put to the expense of a new probate. I must reject the allegation.

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BRAGGE v. DYER and Others.—p. 207.

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*On Admission of an Allegation.*

A paper, written by the deceased herself—at least three months before death—with a blank for the dates, an attestation clause—but no witnesses, and unsigned, with other evidence to show it unfinished; and declarations that she intended to “settle her will in a few days,” is not entitled to probate, either as intended to operate in its actual state, nor on the ground that the execution was prevented by her sudden death the day after such declaration.

AN allegation, to establish a paper as the will of Mary Dyer, was offered on the part of one of the executors, and opposed by fourteen of the lawful cousins-german and next of kin of the deceased. The paper began thus—“In the name of God, Amen, I, Mary Dyer of the parish of St. Paul in the city of Bristol, spinster, do this                      day of one thousand eight hundred and twenty                      , make this my last will, in manner and form following. I appoint my friends, Benjamin Belcher and John Bragge, and my cousin William Dyer executors:” and the paper, after giving 100*l.* to each of her executors, and a variety of legacies to her relations, to strangers, charitable institutions, and providing for her funeral, ended with these words, “To this my will I shall annex a schedule of the property I possess to make every thing as plain and easy as possible, and with it the names and places of abode of persons interested in the same, and if any thing in this will should not be understood, I will my said executors should each choose a person and so settle any thing that may be obscure. Signed, sealed, and published and declared to be the last will and testament in the presence of us who have hereunto set our hands, witnesses, the day and year above written in the presence of the testatrix and each other.” (L. S.)

The allegation, in substance, pleaded:—

1. Mary Dyer died a spinster, aged 69, on the 8th of March 1829, leaving several cousins, and a personal property of 4400*l.*

2. Some time in 1828, the deceased wrote the paper propounded, and intended to sign and execute it before witnesses; but was prevented by sudden illness and death.

3. That she was a Dissenter; was interested for the societies benefited; had affection for the legatees, corresponded with some and gave



money to others; that she wished to draw up a schedule of the property and of the residence of the legatees, and for that purpose, was occupied in making inquiries till her death.

4. A disagreement between the late father and Josiah Dyer, the uncle of the deceased; that she had scarcely any intercourse with her cousins, some of whom she had never seen, and that she spoke of them very seldom and then with indifference.

5. Displeasure, some years ago, with William Dyer, and also with one of her cousins.

6. That Susanna Palmer died in March 1812, and appointed her sister (the deceased) sole executrix of her will and two codicils, who never proved them; that by the second codicil she gave to her executrix a note of hand for 50*l.*, in trust for Bragge or her family; that Mary Dyer had a great regard for Bragge, and by her will bequeathed to her the note of hand.

7. Great confidence in Belcher, one of her executors; that on the 7th of January 1829, an assignment of some leaseholds for an annuity for her life was executed by the deceased in Belcher's presence; that on the solicitor taking away the bond for inrolment and promising to return it in three weeks, she said, "I shall then finally settle my will;" that on the 17th of February the bond was returned, and on the following day she observed to Belcher, "I mean now finally to settle my will; for in that will the vaults and the house adjoining are mentioned as not being sold."

8. That a day or two afterwards she was attacked with inflammation on the chest, thought her illness not serious, went as usual to shops to buy articles; and on the 7th of March told Belcher "she had not settled her will yet, but hoped to do it in a few days."

9. On Sunday, 8th of March, went to chapel; was suddenly taken ill and died immediately: that on the same day Belcher found in her desk the will propounded, carefully wrapped up in a large bill of a tea shop with a red string tied round it.

10. The handwriting of the deceased.

The *King's Advocate* and *Pickard* opposed the allegation.

*Lushington* and *Addams* contra.

JUDGMENT.

SIR JOHN NICHOLL.

The presumption of law is, I apprehend, against the claim of this paper to probate; and it is necessary to examine precisely what the presumption is that must be repelled. It is true, that the paper is all in the deceased's handwriting—is fairly written—is correctly worded. In this paper, the deceased, who was a spinster of advanced age—possessed of property to the amount of 4,400*l.*,—has inserted a great variety of legacies, though she has not disposed of the residue: the inference is that, when she wrote the paper, she had most fully considered its effect and intended to confer upon the several legatees the benefit therein detailed: in short, that the paper contained her testamentary intentions at the time when it was written. It does not require evidence either of affection towards the legatees, or of disaffection towards others to sustain the probability of the disposition; but what requires to be shown is, the reason why she did not complete it. Here is an attestation clause, but no witnesses: here is a blank for a date, but no date: here is a seal, but no signature, though there is a clause to that effect. It is quite clear, then, that it was the intention of the deceased to do something more to give it effect. From the body of the paper it

appears, that she intended to annex a schedule of her property, and of the residences of the legatees; but there is no such schedule: the inference, then, is, that it is an imperfect and unfinished paper, and it must be shown that she adhered to the disposition; and the non-execution must be accounted for.

It has been stated in argument, that there are circumstances which would show that this paper was written late in 1828, but even if it were written quite at the close of that year, there was ample opportunity for its completion. The third, fourth, fifth, and sixth articles, plead remote circumstances to support the probability of the disposition a priori; but these would in any case be unnecessary. The seventh and eighth articles are the material part; but they are rather adverse to the paper: it is apparent from them, that the deceased was not prevented by the act of God, nor did the paper remain unexecuted from her belief that it would operate in its present form; but from the want of having made up her mind to the disposition. The intention was to execute a will but with alterations of some sort. Her declarations were not—that she would execute this will in its present form,—but that she should finally settle her will in a few days. It was natural she should alter it: she had sold the leaseholds, which were bequeathed by it, for an annuity for her own life; which consequently afforded no substitute.

The ninth article pleads her sudden death. In the first place, there had been sufficient time to execute it: some months at least had elapsed since it was written—three weeks, since the enrolment of the bond: had the deceased not intended to make alterations, the execution would speedily have been accomplished; no act, however, was done; but secondly, what was proposed to be done?—not to sign this instrument and get it attested—but to “settle her will.” The Court has neither authority nor discretion to give effect to a paper in respect to which the deceased had not finally made up her mind. On these grounds it is impossible, unless all principles are broken down, to establish this instrument—an instrument which is unfinished—which the deceased neither intended to operate in its present form, nor intended, if not prevented by the act of God, to execute. Her intention was, after the disposal of the leaseholds, not to execute but to “settle her will.”

I reject this allegation, but I allow the expenses out of the estate.

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## M'DONNELL v. PRENDERGAST.—p. 212.

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### *On Petition.*

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An executor, who has renounced, may, any time before administration has passed the seal, retract.

WILLIAM PRENDERGAST died in June 1820, having made his will, and thereof appointed John Bushell, Miles M'Donnell, and John M'Donnell executors and residuary legatees in trust. Probate was taken out by Mr. Bushell in December 1821, power being reserved to the other two executors to be joined. Mr. Bushell died in November 1828, leaving goods of the testator's unadministered. On the 31st of March 1829, John M'Donnell was sworn as executor, but before probate passed the

seal, he changed his mind and wished to renounce: on the 14th of May following, John, and on the 23d of June, Miles M'Donnell (who resided in Spain, and to whom his brother John was agent), severally executed proxies of renunciation, which on the 2d of September being exhibited, administration was prayed by the widow, the residuary legatee for life of a moiety: and a requisition to swear the widow (then resident in France), issued. She was accordingly sworn; but before the administration passed the seal, John M'Donnell, being advised that inconvenience might follow if he abandoned the executorship, and yet be liable to the trusteeship, executed a proxy retracting his renunciation and desiring probate. This was objected to on behalf of the widow, not only on the facts of the case, but also submitting that, "by the law and practice of the Court, it was not competent to an executor to retract a renunciation at any time previous to a grant of administration being made, if such retraction be opposed by the party next entitled to the administration upon such renunciation."

*Dodson*, for the executor.

John M'Donnell has been sworn as executor. An executor cannot renounce after he is sworn. *Anon. Ventris 335*, which case is not distinguishable from the present.

*Lushington* contra.

The subsequent cases and dicta of Lord Mansfield do not accord with the case in *Ventris*. It is there said, that "an executor having taken the oath, could not be admitted to refuse;" but this does not accord with modern practice. *Jackson and Wallington v. Whitehead*, 3 Phill. 577.

*Per Curiam*.

The Court has made no grant upon the renunciation; for the grant is only made by passing under the seal. Can you show a case where a party has renounced and has not been allowed to retract before an actual grant? for I have always understood the rule to be, that an executor is at liberty to retract at any time before the Court has acted by its seal. Till then, the renunciation is not binding on the party; and might, under circumstances, be disallowed by the Court, as if the executor had in any way intermeddled; for then he would not be at liberty to renounce. After the grant of administration a different rule prevails. "If an executor renounce, and the ordinary commit administration to another, the executor is excluded." *Hensloe's case*, 9 Coke, 37; *Robinson v. Pett*, 3 P. Wms. 251.

*Lushington* in continuation.—In several cases, where the Court has allowed an executor (who renounced for the purpose of being examined as a witness) to retract; it has always been said, that such permission to retract is not to be considered as a matter of course. In *Rez v. Sir Edward Simpson*, 1 W. Black. 456, S. C. 3 Burr. 1463, Lord Mansfield, as reported by Blackstone, asked this question: "Is there any case where the Ecclesiastical Court has granted, or this Court has compelled it to grant, a new probate to an executor who has formally renounced?" (a)

The anonymous case in *Ventris* is not now to be considered as binding. If so, then the circumstances must be gone into to show that, in this particular case, the Court will not allow the retraction.

(a) Mr. Elsey, the editor of the new edition of Sir W. Blackstone's Reports, observes in a note, that the passage in the former edition was "who has formerly renounced."

*Per Curiam*.—I have a note of a case which I will read.

“*Crucifer v. Reynolds*.

“*Prerog.* 14th April 1741.

“John Fernsley made his will: John Mace and T. Jameson executors: one shilling to his son: the residue to his two daughters. Mace renounced probate. Reynolds, attorney of Jameson, by an ancient letter of attorney 1728, prayed administration. Mary Crucifer, the daughter, takes out a citation against Jameson to accept or refuse: he being in the Fleet in the Mediterranean, Mace, prior to the return, goes before a Surrogate, and retracts his renunciation and is sworn. At the sitting of the Court, he prays this retraction to be admitted. This is objected against by Crucifer, and that he is going to the West Indies. It being *res integra*, no probate or administration granted, it is rather a matter of right than discretionary. His retraction is admitted and probate decreed.” (a)

*Lushington*.—That could hardly, it would seem, be considered as settled law, because the point was solemnly argued in *Rex v. Sir Edward Simpson*, before Lord *Mansfield* in 1764; he ordered that, prior to an administration being granted by consent to a third party, the *cestui que trusts* should have notice of the proposal, and, as well as the executors, give their answer to it.

*Dodson*, in reply.—In *Rex v. Simpson*, Dr. Collier admits that in some cases, for good consideration, renunciation might be retracted; and the Attorney-General said, “An executor, who has renounced, has a right to be considered as an executor whenever he thinks proper, provided probate has not been granted.” So in the case cited from *Peere Williams*. *The King v. Simpson* was settled; so that case did not overrule the case in *Ventris*.

*Per Curiam*.

The swearing is not an intermeddling. I confess that the admission of an executor's retraction of a renunciation, in order to become a witness, has always presented difficulties to my mind: he is allowed to renounce for the purpose of being examined as a witness to forward the ends of justice, and then is allowed to retract for the benefit of the estate: but this is not done without the consent of all parties in Court. However, the whole tenor of the authorities go to the distinction before mentioned, that, before the grant, the Court must allow the retraction. I think, therefore, that I am bound to decree probate to the executor and residuary legatee in trust.

*Lushington* asked the Court to order the costs to be paid out of the estate.

The Court made the order.

(a) In *Yorke v. Manlove*, *Prerog.* 2d Sess. Hil. Term, 1717, renunciation of administration retracted before it passed under the seal, though decreed. *Prerog.* 1756, Dec. 3, *Hayward v. Dale*, (cited in *Rex v. Sir Edward Simpson*), an executor may revoke his renunciation at any time until grant of administration with will annexed.

### In the Goods of J. WILLIAMS.—p. 217.

The grant of administration to the widow is discretionary; and the next of kin may be preferred, sufficient cause—in this case the lunacy of the widow—being shown; but the Court called for an inventory, and directed the securities to justify.

THE deceased died intestate, leaving a widow a lunatic, and two grandchildren his next of kin.

Addams moved for an administration to the two grandchildren, the next of kin, *for the use and benefit of the widow*: observing, that he understood this was the constant practice.

*Per Curiam.*

The widow is stated to be of the age of 85 and imbecile. It is quite discretionary in the Court to grant an administration to the widow or to the next of kin, 21 Hen. 8. c. 5. s. 3. Much expense, in this instance, will be saved by a direct grant to the next of kin in their own right, and not for the widow's use and benefit. The Court can feel no difficulty in making this grant, since it has been always held that the widow, upon good cause, may be set aside. (a) I decree administration to the two grandchildren jointly, upon their exhibiting an inventory, and the securities justifying.

(a) In *Fleming (late Worley) v. Pelham*, Sir William Wynne granted administration to the husband of a daughter, next of kin, for her use and benefit, in exclusion of the widow, who had in 1781, eloped from her husband, and cohabited with other men till his death in 1805, when she married the man with whom she was then cohabiting. The Court cited the cases of *Lewis v. Lewis* before Dr. Bettesworth, in 1727, where there were a widow and five minor children, and administration was granted to the brother as guardian of the children in exclusion of the widow,—of *Voss v. Cotton*, before Sir George Hay in 1770, where the Court, not thinking the objection sufficiently strong, granted the administration to the widow, but said, he should have granted it to the guardian, if the objection had been sufficient.

*Sir John Nicholl and Dr. W. Stoahey* for the husband of the next of kin.

*Dr. Arnold and Dr. W. Adams* for the relict.

### THE KING'S PROCTOR v. DAINES.—p. 218.

The party, setting up, as a will, a paper not on its face testamentary, must show testamentary intention; and as the law in such cases lends its aid only to effect intention, the question is, whether such a paper, if treated as testamentary, will, in truth, give effect to the deceased's intention, though the Court cannot look at the effect of an instrument clearly testamentary on its face. An administration with a paper having the character of a *donatio inter vivos* annexed, revoked, since if treated as testamentary, the deceased's intention would be defeated. If there is proof, either in the paper itself, or from a clear evidence dehors, 1st, that the writer intended to convey the benefits by it which will be conveyed if the paper be considered testamentary; 2dly, that death was the event to give it effect, an instrument, whatever be its form, may be admitted to probate.

The answer to an interrogatory, confined to the point on which the party's solicitor was produced, is admissible, though he gained his information as solicitor.

THE question, in this case, arose upon a paper propounded as the will of Robert Spink Newson: the instrument, probate of which was opposed on the part of the crown, is recited in the judgment.

*Phillimore and Dodson* for Mrs. Daines, in support of the paper propounded.

*The King's Advocate and Lushington* contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is a question respecting an instrument propounded as the will of Robert Spink Newson, deceased, who died so long ago as the 23rd of August, 1815, at the age of nineteen, a bachelor, and illegitimate. The instrument is dated upon the 29th of June, 1815; and is set up by Mrs. Mary Daines as the universal legatee appointed by it, in which charac-

ter she took out administration, with this paper annexed, in June, 1828; that is, about thirteen years after the death of the alleged testator. That administration has since been called, and she has been put on the proof of the instrument as the will of the deceased: and if it be not valid as a will, the legal property will belong to the Crown; though the real party in the cause is the brother of the deceased. The main question, therefore, for the consideration of the Court is, whether the paper propounded is a testamentary instrument.

It seems material and convenient in the first instance to consider the contents of the paper itself, whether it imports a present gift, or a testamentary bequest to take effect on the death of the deceased, and to be ambulatory till that event consummates it.

The instrument is in these terms:—

“June 29th, 1815.

“I, Robert Spink, in the presence of the two undermentioned witnesses, Thomas Whitmore, of the parish of Stratford St. Mary, in the county of Suffolk, esquire, and Sarah Chapman, of the parish of Peasenhall in the said county, spinster, do give all my goods and chattels unto Mary Daines, of the parish of Peasenhall aforesaid, spinster.

“Witnesses,

Thomas Whitmore  
and

Sarah Chapman.

Signed the day and  
year above written,  
ROBERT SPINK.”

These are the words of the instrument. What then does the person do in the presence of these witnesses? What is the import of the words which he makes use of? “I do give all my goods and chattels unto Mary Daines.” It is hardly possible to use words more directly and strongly importing a present gift. Here is no ambiguity respecting the intention: he declares, *per verba de præsenti*, that he gives those things to Mary Daines. Whether the instrument could be considered valid as a gift or as evidence of a gift, is not what I am now considering; but the import of the words contained in the instrument itself; and there can be no difficulty, I think, upon their construction.

Is the import of these words “I do give,” varied by any thing else contained in the instrument leading to a different understanding, or tending to show it was future and prospective, more especially that it was something to take place after his death—that his death was to consummate and give effect to the gift? By any thing, in short, rendering it testamentary? There is not one word that has any such tendency. It is not entitled a will; nor a codicil: it has no reference to any legacy; nor to any executor; nor to the death of the party writing it: he does not use the words, “I give and bequeath:” he does not use the words “I leave:” there are no solemn words of inception, such as “In the name of God, Amen:” nor any of those expressions which are usually, or frequently at least, found in a testamentary instrument. It then seems to me, that no instrument could be more anxiously or ingeniously devised, and more carefully drawn up, to import a present gift—“do give,”—and to exclude an appearance of, or reference to, an act of a testamentary nature—to any thing at all prospective.

Such, in my judgment, is the import of the instrument itself, looking simply and solely to the words and form in which it is conceived; and in that case it lies on the parties setting it up as a will, to prove that it

was made with a testamentary intention; that it was to be consummated by, and to operate upon, death.

It is true, that if, in point of form, it is drawn up as a deed, yet if it appears, from something in the instrument itself, that it was intended to convey a benefit upon and after death, it may, notwithstanding the apparent form, operate as a will; or if it is equivocal or silent, it may be proved by extrinsic circumstances, to have been intended to operate as a testamentary disposition. Most of the cases upon the subject are to be found referred to in *Thorold and Thorold*, 1 Phill. 1, and in the subsequent case of *Masterman and Maberly*, Vol. II. 225. One or two additional cases have been referred to in the course of the discussion; but they do not appear to me either to carry further, or to alter, the principle which is laid down in those cases—that the form of the instrument is not conclusive against its testamentary effect; that, although it may not be valid in the form in which it was drawn up as a deed of gift, yet that it may operate as a will. But no case has gone the length of deciding, that because an instrument cannot operate in the form given to it, it *must* operate as a will;—it *may* operate as a will if shown to have been written with a testamentary intention.

If there is any proof, either in the paper itself, or from clear evidence *dehors*; first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will; and secondly, that death was the event that was to give effect to it, then, whatever be its form, it may be admitted to probate as testamentary. But the present instrument goes far in the contrary direction; it not only contains nothing that refers to death or to a testamentary disposition, but it rather seems carefully to confine itself to a *donatio inter vivos per verba de præsenti*—"I do give." To give it effect as a will, then, it would require clear evidence that the deceased intended it should operate as such: and perhaps it would require something more; namely, evidence that it was the intention of the deceased to do that which the instrument, as a testamentary act, might possibly effect from supervening circumstances.

It appears that the deceased was the illegitimate son of Robert Spink. The father afterwards married the mother and had another son, nearly ten years younger than the deceased in the cause. This other son, as I have before intimated, through the crown, is to be considered the party principally interested in the present question; rather than the Crown itself, because, in cases of this description, the Crown very liberally grants the principal part of its interest to a person standing in the situation of John Spink.

Mrs. Daines was many years ago employed, not as a servant, but as a sempstress, by Mr. and Mrs. Spink: she became a great favourite of Mrs. Spink; and after her death she retained the confidence of Robert Spink, the father. The father, by his will, has disposed of his property in the following manner: First, he appoints Mr. White and Mr. Man his executors. He then bequeaths, "unto Robert Spink Newson, his natural son, the sum of 500*l.* of lawful British money, when he attains the age of twenty-one years, hoping that he will superintend and take upon himself the care and guardianship of his brother John Exeter Edward's education." In a further part where he disposes of the residue he says: "All the rest and residue of my real and personal estate, corn tithes in Sibton and Peasenhall aforesaid, goods, chattels and effects

whatsoever, with all my ready money, book debts and other debts, securities for money, whether in the public stocks or elsewhere, I devise, give and bequeath unto the said Robert Spink Newson and John Exeter Edward, *my sons by Anne, my late wife, or the survivor of them, and to their heirs and assigns for ever, as tenants in common, and not as joint tenants, to be equally divided between them, share and share alike, when the youngest of them shall be of the age of twenty-one years.*" In a further part respecting the care of those children he says: "I particularly request my said executors to pay due attention to the education of my said children, and they will cause them to be piously educated and instructed in their moral and religious duties. And, as it was their mother's particular desire, I request that Mary Daines of Sibton aforesaid, spinster, her intimate friend, will take upon her the care and guardianship of my said children during their childhood, so far as to select any part of my goods, linen, or any other thing or things that she shall or may think will be convenient and useful for them, and to keep and reserve the same for them, and that she will buy, procure, and make up and mend, or see to the buying, making up, and mending, such linen and clothing and apparel as my said children may want during their minority, as she shall judge necessary and proper for them, according to the instructions she received from their mother my late wife for that purpose; and that the said Mary Daines do from time to time make her own charge on my said executors for all costs, trouble, labour, care and attention in buying, procuring, making up and mending such articles for their use, and that my said executors do from time to time pay and discharge all such demands out of my annual income."

*"In case the children shall both die before they or either of them shall attain the age of twenty-one years, without leaving a wife or lawful issue,"* then the property is devised over, among several persons.

This will is dated the 26th of April, 1810 (a).

In September, 1812, he made a codicil to his will; and by that codicil he recites that, "Whereas I have purchased the house at Peasenhall-street, now in the tenure and occupation of Henry Oldring; and I do order and direct my executors to settle and pay the purchase-money of the same, if not settled for as aforesaid, before my decease; and I will the same as a dwelling-place for Mary Daines, who has undertaken, and it is my will she should superintend, the care and clothing of my two children, Robert and John Spink; and I will that her said dwelling-house be considered as their home during their minority; and I will and direct my executors to pay all reasonable expenses the said Mary Daines may be put to on their account: and I do further desire she may be allowed to select what furniture she may want from my dwelling-house, to furnish the same; and also I will she shall have all the wines and

(a) It was pleaded by the Crown, that, on the younger son attaining the age of 21 years, the executors of the father's will paid over to him, *as the person entitled to the [whole] residuary estate of his father, 25,000*l.** and also delivered to him the title deeds of the real estate, of the value of 2,200*l.*

On the other side it was pleaded, that from the deceased's death Mary Daines retained, in virtue of the will (the paper propounded), possession of the deceased's effects, of which he died possessed at Peasenhall-street, not exceeding 30*l.* in value; and (as a reason why she did not sooner take probate of the paper) that John Exeter Edward Spink did not attain, till 3rd of February, 1827, the age of twenty-one, at which time he was unmarried, and that Mary Daines was not aware that a moiety of the residuary property of the father vested in the said deceased, *so as to be transmissible to his representatives.*



other liquors that are in my house after my funeral, to her's and the said children's use. And it is my will and desire, that she shall have the dwelling, and use of the furniture, free from any rent and charge, during the term of her natural life, without any molestation from any one; and also shall be paid, yearly and every year, the sum of 20*l.* of lawful money also during her natural life, for a compensation of her care and trouble as aforesaid." Thus, though the executors are to have the general superintendence of the education and pious instruction of these youths, yet the care of their persons is more particularly devolved upon Mrs. Mary Daines; she is to live at this house, to have whatever furniture of the deceased's she shall think fit to select. Accordingly, upon the death of Mr. Robert Spink, Mrs. Mary Daines occupied the house at Peasenhall-street: she selected certain articles of furniture for the purpose of furnishing that house: the eldest son continued at school; and afterwards was removed to the University of Cambridge. The other son was at school; but they both spent their vacations with Mrs. Daines at this house, which was intended by the father as a home for them during their minority. The eldest son, when about nineteen, having fallen into a decline, quitted the University and came to Peasenhall-street, and there died, on the 23rd of August, 1815.

There is no reason whatever to doubt that Mrs. Mary Daines faithfully discharged the duty thus committed to her; nor that Robert Spink Newson had a great affection and regard for her. The letters which have been exhibited, as well as the parol evidence, I think, fully establish that he had that attachment which would naturally flow from the relation existing between him and Mrs. Mary Daines; from her maternal kindness at all times; and more particularly from the care and attention she showed during his illness. But this goes a very short way towards the real question in the cause: it tends as much to support the instrument as evidence of a gift *inter vivos* of those little personal articles which he possessed, as to prove that he intended it as a disposition of his property by will. In all this correspondence, I do not observe one single word showing any testamentary intention; nothing indicating a wish to increase that provision which his father had made for Mrs. Daines; not one expression tending to show a desire of making any will; not a word of dissatisfaction or disaffection towards his younger brother; not a hint that he should himself decline to do, when he came of age, that which his father had, in his will expressed a hope he would do, namely, "superintend and take the guardianship of his brother John." These letters, then, of which there are between forty and fifty, establish a great affection for Mrs. Daines, but no testamentary intention whatever—nothing to give the instrument a character different from that which the words of it import.

Under the powers given to Mrs. Daines by the will of the father, she exercised the right of selecting furniture and other articles. The executors required that she should furnish them with an inventory of what she had taken: this she refused to do, and a quarrel ensued between her and the executors, more particularly between her and Mr. White; and in this quarrel, naturally enough considering his situation, the deceased took part with Mrs. Daines. The account of this part of the transaction is given by Mr. Man and Mr. White, the executors of the father, who have been examined as witnesses in this cause. Mr. White was the acting executor. Mr. Man is very advanced in life, and complains of his

memory being feeble ; still, however, his evidence, as far as it goes, tends to confirm the testimony of Mr. White. Mr. White in his deposition on the 6th article of the allegation, gives this account of the quarrel. " The deponent, as the acting executor, paid all Mary Daines' accounts for the necessary expenses of the house at Peasehall, for some time after she and the children had removed thither. He forgets when it was that he ceased to make such payments, but it was in consequence of the circumstances of which he is about to depose : he made several applications to Mary Daines for a regular inventory of the furniture and effects which she had removed to Peasehall from Sibton, but she refused to give, and declared that she never would give, an inventory. Upon one occasion she gave the deponent an inventory of some of such effects ; but not of the plate, linen, and many other things that had been removed : he mentioned those omissions to her, and asked her for a more complete inventory, but she declared that she never would, nor did she ever, give him any other. Mr. Man was with the deponent when he asked her for the inventory the last time, and so was her brother John Daines, but when that was, the deponent does not remember. He has lost the memorandum he made of the circumstances. *Mary Daines, on the deponent's applying to her as aforesaid, claimed the effects of which she refused to give an inventory, as her own ; she said, Mr. Robert Spink had given them to her in his life-time. The deponent observed, that he might as well say that Mr. Robert Spink had given them to him, and asked her, if she had any paper to show, or any witness to prove, that they had been so given to her, and she acknowledged that she had not.* In consequence of Mary Daines' conduct as deposed, the deponent and she very much disagreed, but he endeavoured to avoid dispute with her as much as possible ; whenever he had any thing to say to her, he used to get Mr. Man to go to her. When she refused to give the inventory the last time, the deponent told her that he would not pay her any further accounts she might send to him, until she had furnished him with a correct and proper inventory : she threatened to go to law with him, but he persisted in refusing to pay her accounts, and in consequence thereof, she, in May, 1814, brought an action against him and Mr. Man, as executors, for the recovery of her demands. They were served with a copy of a writ, but on an appearance being entered by them, the action was abandoned. In Hilary term, 1816, Mary Daines filed a bill in Chancery against the deponent and Mr. Man, to enforce the payment of her annuity under the codicil to the deceased's father's will, and of certain moneys expended by her for the use of the said two children of Mr. Robert Spink. The deponent does not recollect any thing that was set forth in the bill in Chancery ; but he remembers that it stated that John Exeter Edward Spink would, on coming of age, be entitled to the whole of his father's property ; his brother Robert being then dead ; and he also remembers that the bill did not state any thing about the said Robert Spink Newson having made or executed any will, or any paper of a testamentary description, disposing of his property after his death. The deponent and Mr. Man put in their answer, and the same was then dismissed with costs against Mary Daines. The deponent gave R. S. Newson money to pay his own bills with, and also paid himself all bills incurred by the brother."

This is the account which Mr. White gives of the dispute between him and Mrs. Mary Daines. It is not at all necessary for the Court to decide whether any blame was imputable to Mrs. Daines on this occa-

sion or not, but several of those facts are important; particularly that passage where the executor states that he asked her whether she had any paper to show, or any witness to prove that the testator, Mr. Robert Spink, had given those articles to her in his life-time; for this part of the evidence does seem to furnish a pretty tolerable clue to the instrument now produced. Mrs. Daines communicated her quarrel with the executors to the deceased, and the deceased took part with her: he had a few things of a personal nature, but the bulk of the furniture, and the other things, not his but in the house, were left by the father for the use of Mrs. Daines, and his sons, and for her use even after they became of age, during the remainder of her life. Robert Spink Newson, then, had nothing but those few articles which a young man coming home from the University, would carry with him. The term "goods and chattels," in the legal acceptation of the words, certainly is of great extent; but it is often used, as a sort of cant term, to designate personal articles of little value. Thus, in this instrument the deceased probably used the words "all my goods and chattels," in the common acceptation of them, as applying to all his "personal articles," rather than in the sense which they would have in a formal legal instrument.

What then is the import of this paper more than to meet the sort of suspicion thrown upon Mrs. Daines, and the demand that was made upon her by the executors? She avers that Mr. Spink gave her certain articles: his executors doubt it; they ask her, have you "any paper to show" that he gave you those articles? Have you any witness to prove it? A quarrel ensues: she will not give any account of the articles; and they will not pay her demand till she renders that account. She complains to the deceased; and he says, well, "I will give you all these 'my goods and chattels,' and here is a paper for you signed by myself, showing that 'I do give' them to you, and it is a paper written in the presence of witnesses, therefore there can be no dispute." Is this the true construction of the paper? or is the Court to consider it as a will, constituting Mrs. Daines his universal legatee—giving to her every thing which he possessed at that time, and every thing he might ever become entitled to, in total exclusion of his younger brother, the legitimate son of his father—the source of the whole property which either he or his brother might possess. Was it the intention of the deceased to make this inofficious disposition? Was it his intention at this time to do a testamentary act, or to show Mrs. Daines a kindness, by simply making this gift of those few personal articles which he had at the time?

The onus probandi—that it is a will, as I have already said, lies upon the party setting up, as testamentary, this instrument which upon its face has no such import but bears the character of a present gift. In such a case the aid of the law is extended only to give effect to the intention of the party; surely, then, the Court should be satisfied that it looks at the whole intention of the deceased: It must take into its consideration even the effect the deceased intended the instrument to have. If an instrument upon the face of it is manifestly executed as a will, the Court cannot look at its effect; it must have legal operation, without regard to the intention as to effect; but if the Court of probate is called upon to assist in carrying into effect the intention of a deceased party, by pronouncing an instrument to be a will, when, upon the face of it, it is a deed of gift, the Court must have the clearest evidence, that the instrument was intended to be a will; more especially supposing that the paper, if

pronounced for as a will, would carry away half the property of the father from his legitimate son; and such might possibly, though I do not undertake to say that it would be the effect.

Now all the circumstances satisfy me, that there was no such intention on the part of Robert Spink Newson; that he never intended to dispossess his brother; that he never intended to convey all his personal property to Mrs. Daines; but that the utmost he intended was, either at that moment to give her all those little articles he possessed at the time, or to provide that she should have the use of them for her life, even if he had lived till he had become of age; for on that event he would be entitled to 500*l.*; and would take more especially the care and management of his younger brother, Mr. John Exeter Edward Spink.

What then is the evidence laid before the Court that this instrument, couched in the present tense, "I do give," was intended as a will? A maid servant, who lived in the family, I think, for about eight months as a servant of all work, was called in for the purpose of putting her name to this instrument; and now—fourteen years subsequent, without any thing occurring at the time, to impress particularly upon her attention and memory what were the words made use of by the deceased, or anything in the intermediate time, which would cause her to retain them in her memory;—she is produced, to prove that the deceased called it "his will:" "I want you to subscribe your name to my will." Having examined her deposition very carefully, and having considered the observations made upon it, the Court, without stating it minutely and in detail, may venture to say that it cannot rely upon her evidence, as proof that the instrument was at that time intended and declared by the deceased to be a will. Whitmore, the other subscribed witness to this paper, is dead: but if his evidence is lost, that loss has arisen through Mrs. Daines' laches in not setting up this instrument as a will at the proper time; namely, when the deceased died. If Mr. Whitmore could have proved it was a will, it would have been very important that his evidence should have been produced: there is, however, just as much reason to suppose that he would have proved it was not a will, but was intended as evidence to Mrs. Daines of a gift of these few things, for the purpose of preventing any disputes.

The fact, that Mr. Whitmore was present and attested the paper, and that the deceased sent for him, is quite as consistent with the intention of drawing up a paper as a deed of gift, as with the intention of making a will. And if the deceased sent for him to assist him in making his will, really this paper is expressed in the most extraordinary terms that could possibly have been made use of. The deceased was a person who had a good deal of intelligence, and Mr. Whitmore is described as a man of business, so that it might be supposed, that if a will had been intended, it would have been worded differently: for, as was before stated, the very form in which it was drawn seems to show that they were careful not to give it a testamentary form; but merely to render it a proof of a gift of these little articles. What, then, is the reasonable probability, on looking at all the circumstances? That neither the deceased, nor any of them, were aware that a minor had a power to make a will even of personalty. The Rev. Mr. Westhorp states, that "he heard the deceased say he had promised his watch to the Rev. Mr. Robinson, as he had no power to leave his money." So that, apparently, he supposed he had,

as a minor, power to give, by way of donation, the few personal articles that belonged to him, but not to make a will.

The evidence seems all to bear the same sort of construction. There is no person about the deceased who ever heard he had made, or had expressed any wish or intention to make, a will, or that Mr. Whitmore was to be sent for, for the purpose of assisting him in making one. Mrs. Daines' own witnesses speak to that effect. His own medical attendant, Mr. Wilson, never heard him say any thing about a will. Dr. Brown never heard him say anything about a will; nor did the Rev. Mr. Uthoff. Even the brother, John Daines, never heard him say anything about a will; "he was not aware he says, that a minor could make a will." The deceased had many confidential friends and attendants about him during the latter part of his life, but there are none of them brought forward to show that the deceased had it ever in his contemplation to make a will.

If, however, he sent for Mr. Whitmore to make a will, or had any intention or inclination whatever to do such an act himself, it does seem very extraordinary, I think, that it never came to the knowledge of any person whatever; because the production of this maid-servant, fourteen years afterwards, and the pretended declaration of Mrs. Daines to her brother, I cannot admit as proof of any intention of a testamentary act in the mind of the deceased at the period in question. What was the conduct of Mrs. Daines herself? She did not on the death of the deceased, produce this instrument and take probate of it; she kept possession of these articles, as she would do under a gift made to her in the lifetime of the deceased; but she never came forward at all to prove this instrument as a testamentary act; she brought an action against the executors of the father's will for her expenditure; she filed a bill against them for the same purpose; which bill, in the year 1816, was dismissed with costs; not merely upon the ground, as pleaded, that she had not funds to go on with the suit, but "because the Attorney General was not made a party to the suit, Robert Spink Newson having died a bastard and intestate." That is the reason assigned by counsel. (a) Still this instrument was

(a) Mr. Cufaude, formerly employed as solicitor for Mrs. Mary Daines, upon the 13th interrogatory, answered:—"The respondent did take the opinion of counsel through his agent, upon the bill in Chancery filed on behalf of Mary Daines, and the counsel, Mr. Wingfield, did give his opinion, that the bill was defective, by reason that the Attorney General had not been made a party thereto. It appears to the deponent, from that opinion, to have been considered necessary, in order to protect the rights of the Crown in that moiety of the personal estate of Robert Spink the elder, to which his son Robert, had he lived, would have been entitled, that the Attorney General should be a party, as representing the interest of the Crown in that moiety, in consequence of Robert Spink the younger having died intestate, a bachelor and illegitimate. Mr. Wingfield also gave it as his opinion, that the testator's heir at law should be a party to the bill if the plaintiff was not so; and also that the persons to whom the property would go in the event of the plaintiff, John Exeter Edward Spink, dying before he should attain twenty-one years of age, should also be parties; and that the bill should therefore be amended in those respects."

The above answer was objected to on behalf of Mrs. Daines, as being the evidence of her solicitor, and as purporting to give the effect, or the witness' opinion of the effect, of a written document without producing it.

*Per Curiam.*

I think this evidence is admissible. It was pleaded by Mrs. Daines,—and Mr. Cufaude was produced, for the purpose of proving,—that the plaintiff had not funds enough to go on with the prosecution of the bill she had filed. On cross-examination, Mr. Cufaude (being examined to that particular fact) admits that it was dismissed, not for the want of funds, but parties. I think the question to the attorney being limited to that particular point, the Court cannot allow the objection to the answer, (*Vaillant v. Dodemead*, 2 Atk. 524.) If an objection were made to any part of the interrogatories that went not to the point on which he was examined in chief, the Court would sustain it.

not produced as a will, though it would at once have removed that difficulty : for Mrs. Daines had only to obtain probate of the paper as a will, and that would have entirely removed out of the cause the necessity of the Crown being made a party, and made her the proper party to sue.

In the year 1828, after the younger brother became of age, a new bill was filed in the Exchequer against the executors of the father, and against the son John, and against the Attorney General, for the annuity and account ; but still in that bill there was no mention whatever of this instrument as a will ; but in consequence of some doubts raised in the course of discussion upon that bill, whether John was entitled to the whole of the father's residue—then this paper was for the first time brought forward, and, in June 1828, Mrs. Daines took probate of it as universal legatee : she did not however call on the Crown, but took it out in common form ; the paper having been examined, the administration was called in.

These are material circumstances in this case. On looking to all these circumstances—looking first to the circumstance that the paper upon the face of it is not testamentary, but rather that it is a declaration of a donatio inter vivos per verba de præsenti—that it lies upon the party setting up such a paper to prove that it was intended to be testamentary, to take effect after death, and to be consummated by that event : considering that this burthen of proof is not lessened by its being the act of a minor, nor by the circumstance that it might have the effect (if it be considered as a testamentary paper) of depriving the legitimate son of the father of this property, and that it would act quite contrary to the intention of any of the parties, I am of opinion that Mrs. Daines has not only failed in proving that this was intended to be a will, but I think that the inference from the evidence is that the instrument was drawn up to be, that which on its face it purports to be, namely, a declaration of a gift inter vivos made in consequence of the dispute between Mrs. Daines and the executors of the deceased's father respecting the gift alleged to have been made by him to Mrs. Daines in his lifetime, but in proof of which Mrs. Daines had neither paper nor witnesses to produce. The deceased and his friend Mr. Whitmore therefore determined that she should have a paper of this description to show that the deceased had given her those articles during his lifetime.

This is the result I think of the evidence upon this instrument with respect to the intention of the deceased, and therefore I am of opinion that Mrs. Daines is not entitled to this property, but that the deceased, Robert Spink Newson, has died intestate, and I direct the administration, granted to Mrs. Daines, to be revoked, and decree administration to the nominees of the Crown.

On an application for costs out of the estate, the King's Advocate said, the Court had no power to grant them ; but that the Crown would not object.

*Per Curium.*

The party must be left to the liberality of the Crown.

## MORWAN v. THOMPSON.—p. 239.

*On Admission of an Allegation.*

A will of a feme covert, made during marriage under a settlement, is not revoked by her surviving the husband.

THIS was a cause of proving the will of Mrs. Robinson; it was dated on the 27th of June 1807, and was made during coverture, in virtue of certain powers vested in her under a bond executed by her husband in contemplation of marriage. The will contained no appointment of executor, nor residuary legatee; and was not republished after the husband's death; it was propounded by a legatee, and opposed by a second cousin—one of the next of kin. The substance of the allegation is set forth in the judgment.

*Lushington* in support of the allegation.

*Phillimore* contra.

JUDGMENT.

SIR JOHN NICHOLL.

This allegation pleads in substance, "that Dorothy Robinson, the deceased, married in 1785 William Robinson, who died in 1819; she survived her husband about a year and died on the 18th of February 1820, leaving some second cousins of whom Robert Morwan is one; that a settlement was executed before her marriage giving her the power to dispose of 700*l*." This settlement is in effect, that, "if the wife dies before the husband, the sum of 700*l* is to be paid on his death to such persons as she by will, notwithstanding coverture, shall direct: if she survives him then the 700*l*. are to be paid to her to be disposed of at her will and pleasure:" so that there were two events contemplated—in the one of her husband surviving, she might dispose of this money by will,—in the other, of her surviving him, the money would become her property absolutely. The allegation further pleads: "that the deceased intending to dispose of all property to which she was entitled under the bond of her husband, dated the 4th of April 1785, and of all other estate and effects over which she had a power of disposition; executed a will on the 27th of June 1807:" by that will she provided for the disposition of this money after the death of her husband: she gave him the 700*l*. for life; but after his death she bequeathed over certain legacies. The allegation then proceeds: "that her husband, by his will, dated in April 1816, added to his wife's provision, by directing that the annuity of 25*l*. secured to her by marriage settlement, was to be increased to 50*l*. ('as she has disposed of her principal money by her will,') to be paid from the time of his decease, to his daughter Alice and her husband, for the maintenance of the deceased, if she continues to reside with them: or more at the discretion of his trustees."

Here, then, the husband provides for his wife, the deceased, surviving him: he recognizes her will as having disposed of the 700*l*., and he seems to refer to what is pleaded to have been her then state of incapacity, for the allegation sets forth, "that the deceased, for several years, before the death of her husband, was in a state of imbecility; and was incapable of recognising the will after his death."

Why then is the fact that she survived her husband to revoke that

will? There is no change of condition: she was testable when she made the will and when she died—both under the settlement and under her husband's will—there is no alteration of circumstances from which an intention to revoke can be presumed. She has provided for the death of her husband; it is on the event of his death that the legacies are given. In his lifetime she had the power of disposing of the 700*l.* notwithstanding coverture; on her surviving him, the 700*l.* absolutely vested in her and became her property disposable at her pleasure: and her will having disposed of it in the event of the husband's death, I can see no reason nor principle why the will should become invalid or be revoked. There is no rule of law, of which I am aware, that holds a will validly made during coverture to become invalid merely by reason of the husband's death. The case of *Stevens v. Bagwell*, 15 Ves. 139, cited in the argument for the next of kin, is, as far as it goes, directly the other way: for there the will was made during coverture, and the husband died before the wife, yet the will was valid. Where a will is made before marriage and the wife survives the husband, in order to render such a will valid there must be something of a republication, because there the intermediate marriage has revoked the principle, and has transferred all the property. That is an intelligible principle. (a) So a will made during coverture where there is no power under settlement to make a will, but a mere revocable assent, on the part of the husband, to her disposing of her chattels real, or choses in action, and property acquired after his death, may require something in the nature of a republication, (b) because she was not testable when the will was made, and she could drive no power from him beyond the extent of his interest in the effects of which her will purports to dispose; but in the present case, I can see no principle or presumption of law on which this will was revoked: and on the ground already stated, I am of opinion that it remained valid after the husband's death, and I therefore admit the allegation. (c).

*Note.* It having been agreed between the parties that the case should be determined by the admission or rejection of the allegation, the suit here dropped; and administration (with the will annexed) limited to the property of which the deceased had a right to dispose, and had disposed of by her will.

Costs were decreed out of the estate.

(a) "This is a will made before marriage; and, as to that point, it is extremely clear that no will made by a feme covert can bind after marriage; because it is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix, and as by marriage she disables herself from making any other will, the instrument ceases to be of that sort, and must be void."—Per Lord Thurlow, in *Hodsdon v. Lloyd*, 2 B. C. C. 544.

(b) See *Miller and Ross v. Brown*, 2 Hag. 209.

(c) See *Dingwall v. Ashew*, 1 Cox, 427. Doe, on demise of *Collins v. Waller*, 7 T. R. 478.

## LORD TRIMLESTOWN v. LADY TRIMLESTOWN.—p. 243.

### *On Petition.*

An administration, with a will annexed, obtained after a caveat entered had expired, but without notice to the adverse party, and while the will was in suit in Ireland—the *forum domicilii*—revoked, as surreptitiously obtained, and the party condemned in the costs of a petition in support of it.



NICHOLAS, Baron Trimlestown, of his last will, dated the 8th of December, 1812, named John O'Shee and Henry Eustace, executors, and his wife, Lady Trimlestown, residuary legatee. In June, 1813, Mr. O'Shee proved the will in the Prerogative Court of Armagh; he died in the beginning of 1815, and on the renunciation of the surviving executor, Lady Trimlestown took letters of administration in the Prerogative Court of Canterbury, with the will annexed, as residuary legatee (a).

On the 14th of July, 1829, a decree was directed to issue against Lady Trimlestown to bring in the administration, and show cause why it should not be revoked. An appearance being given to that decree, an act on petition was entered into on both sides, when on behalf of Lord Trimlestown it was alleged:—"that the deceased died on the 17th of April, 1813, aged 87, leaving a widow, and (by a former marriage) one son—the present Lord, and one daughter; and that he was domiciled in, and died in Ireland; that on the 9th of June, 1813, probate of his will, dated 8th of December, 1812, was granted, in common form, by the Prerogative Court of Armagh, to John O'Shee, one of the executors; that in September, 1813, Lord Trimlestown commenced a suit in that court, why the will should not be declared null and void." [The petition then detailed the proceedings in that cause.] "That various suits were instituted in the Court of Chancery in Ireland by Lady Trimlestown, and by the deceased's daughter, to establish the will of 1812 as to the real estates, and Lord Trimlestown also filed a bill in the same Court to set aside the will as fraudulently obtained; that the Court directed an issue to be tried in the King's Bench in Ireland, whether the alleged will was in fact the will of the deceased or not; that the trial came on in June, 1818, before a special jury, and after lasting seventeen days a juror was withdrawn by consent, and there was no verdict: that in February 1819 the same issue came on for hearing in the Common Pleas, where, after a trial of twelve days, there was a verdict against the will: that various proceedings have since been had by appeal to the House of Lords, and that the suits still remain undetermined. That, notwithstanding the opposition of Lady Trimlestown an administration, *pendente lite*, was on the 4th of September, 1819, granted to the nominee of Lord Trimlestown under condition of his not disturbing Lady Trimlestown in the possession of the family plate and furniture, and produce of the stock at Turvey, she giving an inventory and security as to the same, and that the said administration is still in force. That in 1822, Lady Trimlestown filed a bill in the Court of Chancery in England against Lord Trimlestown and others claiming to be entitled under the deceased's will to a large sum of money awarded to Lord Trimlestown by the Commissioners for the liquidation of the claims of British subjects for estates confiscated in France; that the said suit is now depending in that Court; that on the 25th of June, 1829, administration, with the will of December, 1812, was taken in the Prerogative Court of Canterbury by Lady Trimlestown, as residuary legatee, the surviving executor having renounced." The petition concluded with a

(a) A caveat had been entered, on the part of Lord Trimlestown, in the registry of the Prerogative Court of Canterbury, but an administration *pendente lite* having been granted, by the Prerogative Court of Armagh, to the nominee of Lord Trimlestown, it had not, since the 26th of November, 1825, been renewed.

prayer, "that the administration should be declared void, and Lady Trimlestown condemned in costs."

For Lady Trimlestown, it was alleged, "that in the cause depending in the Prerogative Court of Armagh, publication of the evidence having passed, an exceptive allegation, offered by Lord Trimlestown was, on the 13th of October, 1827, rejected by the Court; that an appeal—thereupon asserted—had not been further prosecuted than by a service of the inhibition. That the Lord Chancellor of Ireland having refused to set aside the verdict of the Jury in the Common Pleas, in February, 1819, an appeal was made to the House of Lords, when the decree was reversed, and the cause remitted; but that since the 14th of June, 1827, no new trial had taken place; that Lord Trimlestown had without notice to Lady Trimlestown though apprized of her claim, received a large dividend upon the sum awarded by the Commissioners, and issued a receipt for the same as executor under a will of the deceased, dated in July, 1805, but which will has not been propounded; that in August, 1822, Lady Trimlestown filed a bill in the Court of Chancery in England, praying an account of all sums of money, or rentes perpetuelles of France awarded to Lord T.: and that the right and interest of Lady T. as the widow and residuary legatee, might be ascertained and secured: that an injunction issued to the Commissioners, who have, in consequence thereof, paid several sums into the hands of the Accountant General, subject to the further order of the Court in the said cause; that in May, 1829, Lord T. served a notice of motion for the purpose of dissolving the injunction, and that the funds might be transferred to him; and Lady T. being advised that she could not safely proceed to a hearing without a representation to the deceased in this Court, and the caveat, entered by Lord T., not having been renewed since the 26th of November, 1825, she obtained letters of administration: that the motion made by Lord T. was refused. That if the administration were revoked, Lord T. might renew his application with success, and deprive her of all beneficial interest in the fund to which she would be entitled under the will of the 8th of December, 1812, if the same were established, and that, if established, the administration is valid;" wherefore it was prayed that the letters of administration might be retained in the registry, and not revoked.

To this answer there was a rejoinder, which,—after entering into some explanations respecting the several suits, between the parties, at law and in equity, and, alleging "that they were impeded by Lady T. not delivering her case in the Delegates, nor paying certain costs ordered by the Lord Chancellor of Ireland; and that the claim upon the money awarded by the Commissioners was not made in due time, and that the claim of Lord T. was preferred as the seul heritier of his late father, and not under any will, and that the receipt for the orders for the dividends had been signed by him in blank, and were without his knowledge filled up by the Clerk of the Commissioners, describing him as executor,"—concluded with the original prayer.

*Lushington*, for Lord Trimlestown.

*The King's Advocate* and *Addams*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

In this case administration with the will annexed was taken in this Court by Lady Trimlestown, and yet it is admitted that the will was at the time in suit in various Courts in Ireland: and it cannot be denied

that this administration was surreptitiously obtained. The deceased was domiciled in and a Peer of Ireland. The Irish Courts then were the proper tribunals to try the validity of his will. How the proceedings have been there carried on is not a fit question for this Court. It cannot examine whether the party was right or wrong, whether he has unnecessarily protracted the suit or not;—the only question is, whether the administration should be revoked. The taking of an administration with a will annexed, which will was in litigation, is, at least, practising a deception upon the Court. During the proceedings in Ireland, Lady Trimlestown, it appears, had obtained an injunction from the Court of Chancery in England against the transfer of certain funds to Lord Trimlestown, and, on the suggestion that there had been on the part of Lord Trimlestown an endeavour to get the injunction dissolved, comes here for an administration, as if this Court could decide whether the injunction was proper to be dissolved or not. The administration too was obtained, after knowledge that a caveat had been entered which was never warned; and that caveat having expired, this administration was taken without giving any notice to the other party. At least then it was obtained, to use a tender expression, irregularly, and the party when ordered to bring it in, resists that order by entering into a long petition. I am bound to revoke and declare this administration void; and, as there is no ground for defending the application, I must condemn the party in the costs of this petition.

Petition rejected.

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RICHARDSON and LANG v. BARRY.—p. 249.

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*On Petition.*

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Deceased having, under a trust deed, power to dispose of certain effects by a will attested by two witnesses, such a will is revoked by a subsequent will containing an express revocatory clause, duly executed, but attested only by one witness; the disposition intended by the deceased being thereby completely effected.

THIS was a cause of bringing into the registry the letters of administration with the will annexed (dated the 16th of June, 1824) of William Barry heretofore granted to the residuary legatee, the father of the deceased, and of accepting an administration with the said will, together with an asserted will, dated the 2nd of October, 1821, as together containing the will of the deceased. The cause was promoted by the executors of the will of 1821, who were also trustees under a deed of settlement dated the 10th of August, 1820.

The petition in substance, alleged "that the deceased, William Barry, in 1820 invested 10,000*l.* navy five per cents. in trustees to pay him the dividends for life, then in trust for such person or persons as he by his last will in writing, or by any writing purporting to be or being in the nature of his last will, or any codicil or codicils thereto to be by him signed and published in the presence of and attested by two or more credible witnesses, should direct; and, in default of such direction, or so far as any such appointment if incomplete should not extend, then in trust for such purposes as therein expressed and declared: that on the 2d of October, 1821, he made a will; appointing the trustees executors

under it; and that this will was duly attested by two witnesses; that on the 16th of June, 1824, he made another will, but attested by one witness only, and died in July 1824 without having altered or revoked his will of 1821 so far as related to the trust fund."

It was answered—"that in June, 1824, he executed a will, whereby after referring to the provision of the deed of trust with respect to the 10,000*l.*, he left the same to be disposed of by the said deed, and by his said last will bequeathed the rest of his property, and appointed his brother sole executor (who renounced); and, revoking all former wills by the said will, declared the same to be 'his only last will;' and that therefore the Court would confirm the letters of administration heretofore granted to the deceased's father."

*Lushington*, and *Addams*, for the executors and trustees.

This Court is always anxious to enable a party to have the benefit of a construction of a testamentary paper by the Court of Chancery: and that Court, before it will decide upon an instrument, invariably requires, if in the nature of a will, that it should be first proved in the Ecclesiastical Court, *Ross v. Ewer*, 3 Atk. 160. 356. The question to be decided in Chancery will be, whether the property is available for the deceased's debts. Our prayer is that probate may be granted of the will of 1824 and of so much of the will of 1821 as is limited to an execution of the power, as together containing the deceased's will. That seems to us the proper course: for the latter will, being only attested by one witness, cannot operate on the settled property, nor revoke the former will as far as it applies to that property.

The *King's Advocate* and *Nicholl* contra.

The question is, whether two inconsistent wills formally drawn up, regularly and duly executed to carry personalty, each, as far as the intention and belief of the deceased go, complete, and distinct and independent in all its parts and dispositions, can be taken together. The will of 1821 has no clause of revocation, but the latter will has. A power, created by a man in limitation of his own rights, is to be construed less strictly against him. The Courts follow a clear expression of intention, when the donor and donee are the same. Supposing no prior existing operative instrument, if the latter will purported to make an appointment of trust money, equity would supply a defective execution. *Sayle v. Freeland*, 2 Ventris, 350. A will and a paper purporting to be a will, are synonymous. *Longford v. Eyre*, 1 P. Wms. 740. If a power is to be executed by a will, or paper purporting to be a will, such paper must have all the properties of a will: inter alia, it must be revocable and by the same means as other wills; and herein differs from a power under a deed. Sugden on Powers, 315. 329-30. The settlement enjoins two requisites for an instrument to convey away the 10,000*l.* different from the provisions of the settlement. 1st, That the disposition should be by last will: 2d, That the will should be executed in the presence of two witnesses. Here, one is the last will, but attested by one witness; the other is attested by two witnesses, but is not the last will. Neither, therefore, is a due compliance with the settlement. Then, as there is no appointment or direction by will, the money must pass under the settlement,—it must pass as provided for in default of an appointment. This is the express intention of the will of 1824. "I will and direct that the same, (viz. the 10,000*l.*) be held by my trustees for the same ends, intents, and purposes as are expressed and declared in the said indenture

of the 10th of August 1820." This is no substantive disposition, but a mere declaration that he had no intention to appoint; but it is not necessary to rely upon this; there is a positive revocation.

The same formalities are not required for revocation as for execution. Between the statutes of wills (32 Hen. 8. c. 37; 34 & 35 Hen. 8. c. 5,) and the statute of frauds, (29 Car. 2. c. 3,) wills in writing could be revoked by parol. *Cranvel v. Saunders*, Cro. Jac. 497. Under sections 5 & 6 of the statute of frauds, what is requisite for the execution of a will is different from what is requisite for its revocation; a writing signed in the presence of three witnesses, but not attested in the presence of the testator, might revoke, though it could not dispose. Other revocations—as cancellation, burning, tearing—are effected without any witnesses. The 12 Car. 2, c. 24. s. 8, which allows a testamentary appointment of guardians, requires two witnesses: but any paper, directly purporting to revoke, unless the revocation is expressly, or by implication, conditional on the completion of a new disposition, is sufficient to revoke a previous appointment of a guardian, made in conformity with the provisions of that statute. *Ex parte Lord Ilchester*, 7 Vesey, 348. Here the paper is competent to effect all it purports; and revokes the former disposition—not by a new and substantive disposition to which it is incompetent, but by express and positive words. A Court of probate—whose object is to follow the intention of a testator—is bound to look with jealousy at an attempt to throw impediments in the way of a free disposition, and will uphold the doctrine, that testamentary intentions are ambulatory. In this case, the first intention of the testator was clearly departed from, and the last explicitly declared, a month before his death, in a will duly executed to carry personalty according to law, by a person capable, under ordinary circumstances, to execute a will. This is not like the case of a married woman, where the power is the foundation of the will; but here a common right is limited by the act of the party. The settlement is to be construed to restrain a disposition of that property by any instrument other than a will executed in the presence of two witnesses, but not to restrain a revocation, neither expressly nor by implication forbidden by the settlement.

This revocation is not subservient, as in *Onions v. Tyrer*, 1 Peere Wms. 343, to a new disposition invalid by reasons either intrinsic, or dehors, but to a new disposition, valid in all its parts.

#### JUDGMENT.

SIR JOHN NICHOLL.

[After shortly stating from the petition the facts of the case, and the prayers on both sides]—The latter instrument, so far as respects personal property, is a completely valid will; and of the intention of the testator there is no doubt: it is clear that he intended the 10,000*l.* should pass under the deed of trust; and he has inserted in the latter will an express revocatory clause: the former paper, therefore, so far as respects this Court, is revoked and is no longer a will. How can this court grant probate of a former paper as containing, together with a complete will—revoking all former wills, the will of the deceased?

It is true that the statute of Frauds, (29 Car. 2, c. 3,) has declared, that certain formalities are necessary to revoke a will of lands; but there is no clause in this deed referring to a revocatory paper; the deceased has imposed upon himself the restriction of not altering the disposition of the deed except by a will attested by two witnesses; but he has not im-

posed upon himself any restrictions as to revoking that will in the way in which a will of personalty may ordinarily be revoked. The will of 1824 in express terms revokes all former wills, and declares that he reverts to the disposition of the trust deed. I am of opinion that the right to do that was not taken from him; that I must consider this as his only will, and that no former will exists, and that, on the authorities stated by counsel, other Courts would hold the same principle. If, however, the former paper be good as an appointment, the party must resort to other jurisdictions, but I am of opinion that, as far as this Court is concerned, the administration with the will of 1824 annexed was rightly granted.

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In the Goods of Lady HATTON FINCH.—p. 225.

On complaint against a proctor, of an extortionate charge (88*l.* 4*s.* 4*d.*) for taking out probate in common form, the bill was referred to the Registrars, who reported the proper charge to be 53*l.* 15*s.* 8*d.* The Court suspended the proctor for three months, and condemned him in costs; it being the first time his conduct had been brought before the Court, and a medical certificate of his inability to attend to business, when the bill was delivered, being produced.

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In the Goods of ELIZABETH ADAMS.—p. 258.

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*On Motion.*

Without the consent or citation of the next of kin, the Court will not, on motion, supported by affidavit of the drawer (the executor and a legatee), grant probate of a will, unsigned, dated some years before, and with an attestation clause and no witnesses, and a recent codicil with a space between the last clause and signature.

THE deceased died on the 6th of March 1830; she left a will, dated on the 10th of July, 1822, with a formal attestation clause, but no signature nor subscribed witness: also a codicil (referring to the will) written in the summer of 1828: this was signed at the bottom, leaving a large space between the signature and the last clause of the codicil. The property was under 600*l.*

*Curteis*, upon the affidavit of the drawer of the will and codicil, who was the sole executor, and a legatee in the sum of 10*l.*, moved for probate. The affidavit stated, that the deceased, at the time the will was read over to her, fully approved of it, and said, that she would postpone the execution of it till her return home, when she would ask two ladies, with whom she resided, to witness it; that the space between the last clause of the codicil and the deceased's signature was purposely left for the insertion of any further legacy.

*Per Curiam.*

Before this grant can pass, there should either be a consent on the part of Mrs. Long, the sister, the sole next of kin, or she should be cited; for I cannot, upon the single affidavit before me, decree probate of these papers. The case must stand over.

## GRINDALL v. GRINDALL and GRINDALL.—p. 259.

*On Admission of an Allegation.*

An allegation—pleading a verdict in ejectment, and the remarks of the Judge thereon, and the names of the witnesses examined—rejected.

THE allegation in substance pleaded :—

1. That an action of ejectment was brought in pursuance of an order of the Court of Chancery, by Charles E. Grindall, one of the parties in this cause, against H. E. P. Sturt Grindall, to try the validity of the last will of Thomas Grindall—being the will here propounded,—as relating to his real estate; that the same came on for trial in the King's Bench on the 20th of April, 1830, and continued during two days, and that the (special) Jury found a verdict for the defendant, thereby establishing the validity of the will, so far as respected the realty; that thereupon the Lord Chief Justice declared “that he perfectly concurred with the Jury in their verdict,” or to that effect.

2. An official copy of the record of the judgment on the verdict.

3. That on the said action the following witnesses [enumerating twenty-three—among whom were the drawer of, and subscribed witness to, the will, and four medical men] were examined on behalf of the defendant, and submitted to cross-examination; that for the plaintiff twelve witnesses [and among them John Stone Grindall, the brother of the plaintiff, and one of the parties in the above cause] were examined; and that the whole of the said witnesses, except J. S. Grindall and two other of the plaintiff's witnesses, have been, or are intended to be, examined as witnesses in this cause.

*Phillimore* opposed the allegation.

*Lushington*, and *Dodson*, contra.

It was said, that a verdict in an action of ejectment, for the purpose of trying the validity of the will as to realty, is not admissible in a suit respecting the same will in these courts. But a verdict in assumpsit was admitted in *Dew v. Clark (a)*. The allegation is admissible to show, that the witnesses, examined in this cause, have undergone an examination before a Jury; and the relative weight given, at Common Law, to their testimony. The declaration of the Judge is important as a valuable confirmation of the decision of the Jury.

(a) The allegation in the case referred to in the text, consisted of twenty-two articles, of which the 16th and 17th pleaded a verdict, in substance as follows: “That the husband of Mrs. Dew, as sole heiress at law of the deceased, (in order to try the question of the deceased's sanity at the execution of the will,) brought, in June, 1822, an action in the King's Bench, against F., the devisee in trust, for money received by him as rent of freehold property accrued since the deceased's death; that issue was joined on a plea of non assumpsit; and on the 20th of December a verdict with costs was given for the plaintiff: that F. defended the action under the direction of the nephews [the residuary legatees under the will, and the parties to the suit in the Prerogative Court]; and, in the course of the proceedings changed from his own attorney to the confidential attorney of the nephews, and that he has been since reimbursed his costs by the nephews, or that they have made themselves responsible for them.”

From reference to three different notes of the argument, it would seem that the main objection to the plea was, that Mrs. Dew, the deceased's daughter, had, in her former allegation, only set up a case of insanity *quoad hanc*: and that the plea then under discussion, alleged general insanity, and pleaded facts not *noviter perventa*; the introduction of this verdict was also objected to; and the argument on this point was, in substance, as follows :—“Verdict on action in assumpsit against a devisee in trust—not one of the parties here—is pleaded. If

## JUDGMENT.

Sir JOHN NICHOLL.

It is well worth consideration, whether it would be desirable to admit such verdicts. Divorce causes are under very particular and special circumstances. To this action the heir at law alone was the party, and the verdict might, possibly, be by collusion. The Ecclesiastical Court must decide on its own evidence. This allegation might tend to expense and delay; if the one party is entitled to plead that the Chief Justice approved of the verdict, the other party is entitled to plead that he disapproved; and then this Court would be required to try the propriety of the verdict, and the Chief Justice might be called on to be examined as to his opinion. In *Price v. Clark and Pugh*, (a) the question was raised and decided on much consideration. I am disposed to follow that decision, unless authorities, quite in point, can be shown of a contrary purport. Verdicts may possibly have been admitted in some instances—not as evidence on the main question, but as affecting costs, where there was an appearance of delay, and that the suit was vexatious and litigious. (b). I do not, at the present moment, recollect the circumstan-

verdicts of this kind are to be admitted, it should be stated whether any defence or not—whether witnesses examined,—but objectionable altogether.”

*Contra*. “Verdict not conclusive, but adminicular evidence. Dr. Lushington says, none such has been given during his time; if not so, a short time before”—(probably alluding to *Mill v. Mill* and *Leslie*, in 1807, reported *infra*, p. 103. n.) Verdicts in matrimonial cases are *inter alios acta*; so in writs de lunatico inquirendo.”

The Court rejected from the 3d to the 9th articles inclusive, as remote, equivocal, or sufficiently pleaded in the 1st article; and admitted the rest, saying, in the course of its observations on the plea, and on the objections thereto—that “considering Mrs. Dew was the only child, and that her former plea was given in hastily, at the same time as the condidit, for the purpose of examining witnesses of advanced age, it was not inclined too rigidly to exclude any thing.”

From this admission the nephews appealed to the Court of Delegates: Mrs. Dew did not appeal.

The arguments, which were at considerable length, were directed almost entirely to the point, that the allegation set up a different case from the former, and pleaded matter not responsive, nor noviter perventa. The objection to the verdict was shortly renewed, as appears from two notes, the substance of which is as follows:

[*Dr. Adams, Dr. Lushington, and John Williams*—in objection to the 16th and 17th articles.] Judgment went by default; it was an undefended cause; the plaintiff obtained his verdict, the defendant not appearing and making no defence—the verdict proves nothing—is not legal evidence—will lead to further pleading.

*Hullock, Baron*. The verdict can be no evidence as to capacity: but may it not affect costs?

*Argument*. It certainly has no bearing upon the sanity; how far it may have an effect on the question of costs we do not wish to examine.

*Jenner and Phillimore contra*. These articles are pleaded as showing the conduct of the parties: they bear on the circumstances of the case, and on costs. At law, the daughter's rights could only be impeached by setting up this will. The nephews would not go to a jury. Exhibit, No. 3, shows that 3*l*. 18*s*. 9*d*. was the sum recovered, but that the costs amounted to 376*l*. 1*s*. 3*d*. Such large costs prove that the parties must have been prepared to go into the whole case, and that the nephews afterwards abandoned it. It is said that this should have been pleaded before; but judgment was not obtained till February, 1823, although the verdict was obtained on the 20th of December, 1822. The former allegation was given in July, 1822: the verdict, therefore, could not have been pleaded at an earlier period.

The Court affirmed the decree of the Prerogative Court with 100*l*. nomine expensarum.

*Note*.—In *Grindall v. Grindall*, it was not stated that the allegation in *Drew v. Clark* had been before the Court of Delegates.

(a) See the next case.

(b) As one of the next of kin—a party to this suit—was examined, at common law, against the validity of the will, it is clear that a verdict against the will could not have been received: and as “nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary,”\* the verdict for the will was not admissible. If these verdicts were evidence in the Ecclesiastical Courts, it is conceived that legatees and others, interested in the personality, would not be competent witnesses in the action at common law.

\* 1 Phillips' Evid. p. 309, 6th edit. citing Gilb. Ev. 28.



ces under which the verdict in *Dew v. Clark*, was admitted; possibly it was on some such grounds: but assuming that I did there, inadvertently and erroneously, admit such a verdict, I do not feel myself precluded by that circumstance from reverting to what appears to me the ancient and more correct practice. In *Mill v. Mill and Leslie*, (a) a verdict was admitted principally as bearing on costs: but, besides it was part of a long allegation otherwise admissible, and the admission might produce less expense and delay than if the allegation had been reformed. Here the verdict may be brought in at any time, as an exhibit, for the purpose of affecting the question of costs: but if now admitted, it might have a very improper effect and lead to much expensive litigation.

*Dr. Lushington* stated, that though he had felt bound, in conformity with the precedent in *Dew v. Clark*, to offer this allegation, his own opinion was adverse to the admissibility of such verdicts.

Allegation rejected.

(c) *MILL v. MILL and LESLIE*.—p. 264.

On Admission of an Allegation.

*Dr. Arnold* and *Dr. Adams* in objection.

*Sir John Nicholl*, (King's Adv.) *Dr. Laurence*, and *Dr. Burnaby*, contra. [No cases in which verdicts had been admitted were cited.]

*Per Curiam*. (Sir William Wynne.)

Three codicils are propounded and opposed: the will is not opposed. A long allegation, in answer to the allegation propounding these papers, pleading insanity and incapacity, has been admitted. The present plea is responsive; the bulk of it, which is not objected to, goes to show the connection between the deceased and the party benefited. The 6th and 7th articles, which plead that a verdict at law has been given in favour of the earliest of these codicils, are opposed; and the question is, whether they can be, in any way, relevant or of use. It is true, that this Court must decide upon its own evidence, and this is not offered as decisive or conclusive; but is the verdict of any weight in this Court? Verdicts are received in divorce causes; in testamentary causes, verdicts under a commission of lunacy and of a coroner's inquest are received.\* If there be evidence in favour of the codicil, this verdict may possibly give it some additional weight; at least it will be satisfactory to know that another Court was of the same opinion: but what chiefly weighs with me is, that it would tend to show the conduct of the parties, and thus bear on the question of costs: there is an appearance of delay, and it may show that the opposition is vexatious and litigious. Under these circumstances, particularly, I shall admit the allegation.

\* See 1 Starkie on Evid. 275-8, as to the grounds on which such verdicts (which are analogous to adjudications in rem) are received in evidence.

PRICE v. CLARK and PUGH.—p. 265.

102.1

A verdict, in an action of ejectment, cannot be pleaded in a testamentary cause.

On appeals from definitive sentences, matter which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined below, is not admissible: but matter more generally responsive may with caution be received, especially where the cause has not been properly conducted in the Court below.

An allegation, responsive to one given in the Court of Appeal, (a) pleaded in the first and second articles a verdict, in an action of eject-

(a) *PRICE v. CLARK and PUGH*.

On Appeal from Hereford.

This cause respected the will of Samuel Williams: the will was dated on the 29th of August,

ment establishing the validity of the will. These articles were objected to.

*Per Curiam.*

I wish to know whether there is any instance where a verdict at common law has been received in a testamentary cause: If not, I shall be unwilling to break in upon the practice. I shall let the allegation stand over for inquiry.

On a subsequent day the Court delivered its opinion as follows:—

JUDGMENT.

SIR WILLIAM WYNNE.

This is a testamentary cause; and is here by an appeal from Hereford, where, on the 10th of August, 1793, sentence was given for the will; an appeal was prosecuted on the second session of Trinity term 1794, an allegation was admitted in this Court, on behalf of the appellant the opponent of the will: and now an allegation is offered responsive, pleading a verdict in a cause of ejectment tried at the assizes at Shrewsbury,

1791; and the party died three weeks afterwards: it was propounded in a common condidit, upon which the three subscribing witnesses were examined: the executors afterwards gave in allegation, and examined witnesses upon it. The Court below pronounced for the will. Upon an appeal from this sentence, the next of kin, who had hitherto given no plea, now offered an allegation: and, upon the admissibility of this plea, the Dean of the Arches observed:

*Per Curiam, (Sir Wm. Wynne.)*

It has been said, that though the Court, even in an appeal from a definitive sentence, may admit an allegation, yet that it ought to be cautious, and not allow any thing to be pleaded, which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined in the Court below.\* This is a rule which the Court will observe as exactly as it can; but where causes come from country courts, this Court cannot always, consistently with justice, observe it; because, in the Courts below, causes are often awkwardly conducted. I have looked into the proceedings, and all that I will say is, that they are such that the Court is not inclined to reject any thing which may tend to elucidate the transaction. I think there is something which requires examination.

The first article pleads, in contradiction to the condidit, incapacity at the time of the execution: it is so contrary to all rules to admit, on an appeal from a definitive sentence, witnesses to speak to a fact directly pleaded and examined to, that I must reject this article. The second, "that the deceased, though his bodily strength was much impaired, was in his senses, notwithstanding a paralytic stroke twenty years before, and so continued till a second stroke; that he had a second stroke six weeks before his death, which rendered him incapable, and that he was so considered." It is material for the Court to know the state of the deceased's mind and body: a weakness of body makes a man liable to imposition; the first part of this article is therefore proper: but "that he was struck with a second paralytic stroke six weeks before his death," &c.—this may introduce evidence contradictory to witnesses on the codicil: still, however, under the circumstances of the case, I will admit general evidence of the state of the deceased's capacity.

3. "That before this fit, he made a declaration in favor of his relations; and further pleaded the importunity of his wife with great passion." This is proper to admit. It appears that there was a controversy between the deceased and his wife about the disposal of some effects. I think that this article is material to show the deceased's intention, and the attempt of his wife.

The 4th states more than the mere disposition of the will; for it pleads a relationship of some of the legatees with the deceased's wife.

5. That the wife was violent, kept her husband in subjugation, and prevented a communication with his relations: this is material, for though it pleads not incapacity, yet it tends to show a complete subjugation to the wife.

The 6th pleads circumstances respecting a will said to be made by the deceased two years before his death, whilst he was ill; that it was obtained by the procurement of the wife, who was violent. This regards a will not before the Court, but the article charges that it was done by the direction of the wife; that two persons—executors in this will—were present; and that the same person wrote that will who wrote the present. This is an accusation of the same nature as that charged here on the same person; and I cannot reject it: but I reject a conversation of the wife afterwards pleaded. When these articles are reformed, I admit the allegation.

\* Oughton, tit. 318, s. 1.

in which the question was, whether the testator was of sound mind and capable at the time of making the will, and a verdict was given for Margaret Williams, the defendant—the real party here. The second article exhibits a copy of the judgment. On debate it occurred to me that it was a new practice. I did not recollect an instance, and no case was quoted, where a verdict in ejectment had been pleaded. Counsel alluded to cases in the Consistory Court in causes of adultery, where verdicts for damages against the party seducing have been admitted; and it is now the usual practice. The Court thought that even there the practice was novel; for in 1736, in the case of *Dinely v. Dinely*, the Court of Delegates refused to admit the verdict. Now, however, the practice to receive them is not to be controverted: but it is said by counsel that those cases are not parallel with a testamentary cause: and I think truly; for as matrimonial causes may be brought by collusion, the Court is always to proceed with extreme caution; and I think that, therefore, such cases are not parallel with a testamentary cause, where there is no reason to suppose that the parties are not sincere in their opposition to each other. Considering these circumstances, I took to this day to inquire, whether, in any testamentary cause, such a verdict had been received; and after all the inquiry I have made, I cannot find an instance where an article has been admitted introducing a verdict: nor do I find any instance in which it has been attempted and rejected. The absence of all precedent proves, I think, that in practice, a verdict in ejectment is not considered admissible evidence; because, without doubt, cases in which the will has been put in question both in the ecclesiastical and common law Courts, are very frequent; and, in such cases, it generally happens, from the different mode of proceeding, that the verdict will be obtained first: but still the attempt has never been made.

I believe that what the practitioners have in general understood is, that a verdict is irrelevant and not proper to be received. If, then, it be so; if there be no precedent to guide me, the point comes to be considered on principle, and on the reason of the thing. There are many cases where the parties in both Courts are the same, where proceedings may be, and have been introduced from one Court into another. There are also instances in which depositions from Chancery have been here introduced: as in *Middleton v. Forbes*, (a) depositions relating to a deed of gift by the party whose will was contested, *Wells v. Middleton*, 1 Cox, 112: so also in *Bainbridge v. Gee*, Hilary Term 1777, depositions between the same parties in the Exchequer were received. The practice in Chancery is the same. *Mildmay v. Mildmay*. (b) But in all these cases the very evidence itself, which was given in the other Court, was received. The Judge, therefore, had the opportunity of weighing the evidence given in another Court, with the evidence of the same witnesses, or of other witnesses in his own Court; he had then before him that upon which he could form his own opinion: then the objection was taken away.

There are also other cases where a verdict is introduced into the Ecclesiastical Court, and is binding; and vice versa, where the sen-

(a) For the Judgment and some further particulars of that case, see 1 Hagg. 395.

(b) 1 Vernon, 53. In *Taylor v. Bouchier*, the Master of the Rolls made a general order for reading the proceedings in the Prerogative Court. See 4 Bro. P. C. 715.

tence of these Courts is introduced into, and is conclusive upon, other Courts: as where a clergyman is accused of a crime indictable at Common Law, and for which he may be deprived in the Ecclesiastical Court, the verdict there is conclusive evidence; and the Court must admit the verdict as proof of his conviction and guilt, and must proceed thereon. (a) So, in Common Law, where the legality and not merely the fact of marriage is in question, the Court writes to the Ordinary: the Ordinary tries and certifies, and the Court is bound by his certificate. (b) If an action is brought upon a contract of marriage, and before the marriage act, a proceeding was had here on the same contract, and sentence against it, such sentence was held binding in a Court of Common Law. *Da Costa v. Villa Real*, 2 Strange, 960; *Hatfield v. Hatfield*, 5 Brown, P. C. 100. The principle is, that the Court, before which the verdict or sentence of another Court is brought, was not competent in jurisdiction to examine, or to determine upon the facts; and the judgment introduced was therefore conclusive. (c) That is not the case in a testamentary cause; for the Ecclesiastical Court is as competent to determine on a will of personal estate, as a Court of Common Law on a will of real estate: it is not suggested, indeed, that the verdict is binding and conclusive, but that it is circumstantial evidence: I cannot see how the Court can pay any regard to it in that light. Suppose the Court should think that the executors fail in proof of the will, would any counsel take upon himself to argue—"I think the evidence before the Court is insufficient; but here is a verdict by which it is apparent that another Court has pronounced for the will, therefore though there is no legal evidence here you must pronounce for it, because another Court has." This cannot be said. What is the use of the verdict? If there be sufficient legal evidence here, I shall pronounce for the will; then the verdict is of no avail: but if there be not sufficient evidence I cannot, upon the ground of the verdict, pronounce against the evidence before me. Then I do not see upon what ground it is relevant.

But it does not rest here: for I think pleading a verdict is not only useless, but may be productive of great inconvenience, and of that this allegation affords a strong instance. The first article pleads that "at the trial at law, the question was, whether, at the time of making the will, the testator was of sound mind and capable:" but this is not the issue before me. The allegation of the next of kin here pleads, "that Ralph Heartshorn wrote the will by the direction of Margaret Williams without the consent of the deceased; that it was carried into the room where the deceased lay, groaning, and it was signed under the control of the wife." Then here are facts to overthrow the will, though the deceased might be of sane mind. It is also pleaded, "that she was of a violent temper." Dr. Nicholl, her counsel, who was aware of this, has said, that the plea was incautiously drawn; that it might have been more proper to plead generally, that the question was upon the validity of the will, and that the verdict was for the defendant. Suppose it had been so: that would not remove the objection. If the verdict had been pleaded generally,

(a) *Searle's Case*, Hob. 121, and see 1 Consistory Reports, 141, in notis; also *Wilkinson v. Gordon*, 2 Add. 158.

(b) See *Ilderton v. Ilderton*, 2 H. Bl. 145; 1 Phillipp's Ev. p. 322, 6th edit.; 2 Starkie Ev. p. 217; Woolrych on Certificates, s. 2, p. 10.

(c) Cases of this class are proceedings in rem: as to which and the effect of sentences therein see 1 Starkie Ev. p. 227. 231. 243.

and the allegation had been admitted; and the other party had given an allegation, that the question of custody was not matter before the jury, for that there was no evidence to that fact, I do not see how the Court could reject that allegation: for if it is relevant for one party to give an allegation pleading the verdict, it is relevant for the other to say, it does not apply to the facts in issue in this Court. Suppose again, after publication, the party was to say, "I will show that the evidence before the jury differed materially from that now given, and will prove it:" could the Court properly reject an allegation for that purpose? if not, what a door to litigation and expense would be opened—an inquiry into what was done in another Court: the inconvenience would be infinite and endless: therefore if it be *res integra*, which I take it to be, the Court ought not to admit the plea, but ought to adhere to the ancient and established practice, that you shall not be at liberty to give a judgment of another Court in proof, where the Court cannot see the evidence upon which that judgment was given; but that the Court is to decide *secundum allegata et probata*. I will not make a precedent, thinking it will lead to inconvenience: I shall therefore reject the first and second articles of this allegation.

Allegation reformed.

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### KEMBLE and SMALES v. CHURCH.—p. 273.

Where the attesting witnesses—disinterested medical men—speak strongly to sanity, the Court will not set aside a will on proof by interrogatories, but without plea, that the deceased, many years before, had been under an insane delusion.

ELIZABETH WILSON died on the 18th of September, 1829, a widow, of the age of 70 years, leaving three daughters and a son. By her will and two codicils dated, and executed, on the 10th of September, 1829, she left, among other legacies, 400*l.* in specific bequests to different charities, and, to several dissenting ministers, some legacies of 50*l.* each, and the residue among her children. She appointed Henry Kemble, a friend of the deceased, and her cousin, Maria Smales, who had lived with the deceased and her mother, for a great many years, executors, and legatees of 50*l.* each; and to Maria Smales she also gave an annuity of 25*l.* The object of the first codicil was to secure to her married daughter, Mrs. Church, her share independent of her husband; and upon her death, to her children; the second codicil—instead of increasing the annuity to Miss Smales to 50*l.*, which the deceased, at the execution of the will had at first contemplated—left her a small leasehold cottage. The will was in the hand-writing of Miss Smales, and was pleaded to have been prepared from a former will drawn up in 1827, and from verbal instructions from the deceased; but that she declined to execute it at that time, as she had not made up her mind as to the disposition of her property to Mrs. Church. The deceased, in the beginning of September, went to Southampton, and was there seized with a severe illness. On the morning of the 10th, her medical attendants pronounced her in danger, and being informed that her will was unexecuted, she was asked—if she wished to execute it, and she gave an affirmative answer. Dr. Down, her physician, understanding that the

will had not been prepared by a professional man, recommended that one should see it. An attorney was accordingly called in, and after some blanks were filled up, and some alterations made, Dr. Down read the will over to the deceased, in the course of which, she suggested an additional annuity to Miss Smales, which ultimately ended in the making of the second codicil and the substitution of the small cottage; the will was again read a second time to the deceased, who, having approved it, was raised in bed for the execution, when a book was brought for her to rest the paper upon: but—after looking at it—she said, “I won’t use that—it is the Bible.” The four witnesses, viz. the two medical men—the attorney—and Mrs. Margaret Smales, the aunt of the executrix,—examined upon the allegation given in on behalf of the executors, deposed, that they entertained no doubt of her capacity and volition.

On interrogatories it appeared, that, seventeen years before her death, the deceased had been affected with insane delusions, chiefly on religious matters; and in June, 1828, had experienced a return of the malady: and, from that time to her death, was attended by a nurse accustomed to the care of persons afflicted in that way; but there was no proof of the presence of this malady, or of any symptoms of it—either at the time the will was prepared, or at the time of the execution.

*Addams and Haggard* for the executors.

The will and codicils are opposed by the husband of Mrs. Church, who has been admitted a contradictor for this purpose, but his wife—the daughter of the deceased—has declined to join in the proxy. There is no case in which insanity has been allowed to be made out on interrogatories merely; but we have established a lucid interval; though to do it we were not bound.

*Lushington and Dodson*, contra.

The principles, applicable to this case, are defined in the recent case of *Groom and Evans v. Thomas*, 2 Hagg. 433. Here insanity is proved: the onus to rebut it is upon those who had the means of ascertaining a return to soundness. The nurse has not been examined. At the execution of these papers, the deceased’s particular delusions were not touched upon. If a will may not be set aside on evidence obtained upon cross-examination alone without pleading, what is the effect of calling for proof in solemn form of law? The allegation pleads soundness of mind—and the evidence negatives it. There is a failure of proof as to sanity.

*Per Curiam.*

What do the attesting witnesses say?

*Argument.*—They put no question to the deceased, except as to her immediate illness, and her state of health.

JUDGMENT.

SIR JOHN NICHOLL.

The inclination of my opinion is strong in favour of this paper. Where there are two attesting witnesses, both being medical men, and in attendance upon the deceased; and when she herself at the execution directs an additional bequest,—approves of what she is about to sign,—and is shown to manifest capacity and volition, it would be the strangest thing to pronounce against the paper, because it appeared, on interrogatory, that, about seventeen years before, the deceased had laboured under insane delusions. The witnesses are disinterested—the

medical men perfectly so:—they were aware that she had been under delusion, but saw no appearance of it at the time. If there had been a case to set aside the will, it should have been put in plea. It is my present impression that I must pronounce for the papers propounded.

The cause stood over till the 19th, when the Court decreed probate to the executors of the will and codicils; and recommended that the expenses should be paid out of the estate.

### MILLER v. WASHINGTON.—p. 277.

#### *On Motion.*

Where administration to a person long dead was prayed by a creditor, and there had been no personal service on the next of kin (who had no known agent in this country), the Court required full information as to the debt and the cause of the delay, and that notice should be given to the next of kin in the West Indies.

WILLIAM M'GILL died in the West Indies in 1809, intestate, leaving Mrs. Washington, his niece and next of kin, now resident at Nevis, and who has no agent in this country. In 1815, Mr. Ward, formerly Judge of the Vice Admiralty Court at Nevis, and a creditor of the deceased, died, having appointed Sarah Miller his residuary legatee; she proved the will, and thus became a creditor of M'Gill's estate. The debt amounted to more than 500*l.*, and exceeded the effects.

On 20th of April, 1830, a decree with intimation was served upon the Royal Exchange; and *Lushington* now moved, on behalf of the creditrix, for an administration to M'Gill.

#### *Per Curiam.*

M'Gill has been dead upwards of twenty years: when such a length of time is suffered to elapse, and when there has been no personal service on the next of kin, the Court requires a fuller account as to how the debt was incurred, and what is the proof of it: the Court must also be furnished with a fuller affidavit of the particulars of the debt, and an explanation why an earlier application has not been made. Mr. Ward, the original creditor, died in 1815, and his representative has not taken any steps towards this administration till the present year. As the applicant has waited so long, and as the niece is resident in the island of Nevis, some notice should be given to her; a mere service on the Royal Exchange is not sufficient: Mrs. Washington may be ignorant of her uncle's property: and for the present I must reject the motion, but I will allow a fresh decree to issue which may be served upon Mrs. Washington: and I wish it to be considered rather as a general rule, that where a next of kin or party in distribution is as accessible as in this case, a notice should be sent to the party. (*a*)

Motion to stand over.

(*a*) So in *David v. Rees*, where the will had been proved by the attorney of the executor, who died on the 23d of July, 1829, a decree—at the suit of a legatee, calling upon the executor and residuary legatee, both resident in the West Indies, to show cause why administration *de bonis non*, with the will annexed, should not be granted to him, served on the Royal Exchange—was returned into Court on the 1st Session, and an affidavit was made that neither the executor nor residuary legatee had any agent in this country; the Court directed the matter to stand over,

saying, "it did not even appear that the executor was acquainted with the death of his attorney; the communication with the West Indies was so easy, that some notice should be given to the executor, or, at least, sufficient time should be allowed to elapse, since the attorney's death, for the executor, on receipt of the intelligence, to take probate himself, or appoint a new attorney."

In *Norrington v. Nembhead*, the Court granted administration, with a will annexed, to a legatee, on a service on the Royal Exchange, and on an affidavit that there was no agent in this country; observing, "here the party having died in Jamaica, in 1823, the residuary legatee living there, and no steps having been taken to prove the will for so long a time, I will grant this administration to the grand-daughter, who is a legatee; but it is to be understood, that, generally, where the parties interested are only in the West Indies, the Court will require notice to be given them by a requisition."

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### COPELAND v. RIVERS.—p. 279.

#### *On Motion.*

The residuary legatee in trust having renounced administration cum testamento annexo for the purpose of being examined as a witness, the Court hesitatingly, but as matter of necessity appointed a next friend guardian ad litem in order to prepond, on behalf of the minors, residuary legatees, the paper which their father opposed: but required the guardian to give security for costs.

JOSIAH RIVERS died on 10th of March 1830, leaving a testamentary paper, unexecuted and without date. By it he had appointed William Taylor Copeland residuary legatee in trust for the children of William Rivers, the deceased's brother. William Rivers opposed the will; and Mr. Copeland, who was willing to take administration with the will annexed, had renounced in order to be examined in support of it. The property was under 2000*l*.

The *King's Advocate* moved for the appointment of William Hammersley, Esq. as guardian to the minors for the purpose of propounding the paper.

#### *Per Curiam.*

The minors have not executed a proxy of election, and the eldest is of the age of seventeen. But is there any instance of this Court appointing a next friend as guardian ad litem? Who is to be liable for costs if the paper should not be established? In the Court of Chancery such an appointment is of ordinary occurrence, but here it is a novelty. The circumstances, however, seem to require it; and I shall therefore appoint Mr. Hammersley guardian ad litem: and direct him to give security in 200*l*. for costs.

Motion granted.

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### HEADINGTON v. HOLLOWAY.—p. 280.

The Court will not pronounce for a paper on the evidence of handwriting alone, but that proof joined with circumstances of probability is sufficient. Costs are peculiarly in the discretion of the Court; and though the general rule is, that a legatee, loco executoris, propounding and establishing a paper is entitled to his costs out of the estate, his unwise delay in producing the paper, and thus occasioning the suit, is a ground for refusing them.

ELIZABETH HEADINGTON, widow, died on the 25th of March, 1829, at the age of 80 years, leaving no near relation: of her will, dated the 11th of September, 1828, she appointed Richard Clement Headington, and



the Reverend Henry Holloway, the parties in this cause, two of her executors. The question respected a paper propounded by Mr. Holloway as a codicil.

The *King's Advocate* and *Addams* in support of the paper propounded. *Lushington* and *Dodson* contra.

JUDGMENT.

SIR JOHN NICHOLL.

The deceased in this cause died in 1829; her husband had died in 1819. Her property is said to be of the value of 10,700*l*. The paper, propounded as a codicil, is dated on the 12th of October, 1828, and is to this effect:

"I give to my dear Henry [meaning the Reverend Henry Holloway] a policy of insurance on my own life effected in the Sun Life Office for the sum of five thousand pounds, and this may act as a codicil to my last will and testament." (a)

"Elizabeth Headington."

This paper is alleged to be in the deceased's handwriting; and though the Court will not pronounce on evidence of handwriting solely, (see *Constable v. Steibel* and *Emanuel*, 1 Hagg. 60; *Crisp and Ryder v. Walpole*, 2 Hagg. 531,) yet when that proof is joined to circumstances rendering the instrument probable and natural, it is not necessary to have any thing more immediately connecting it with the deceased.

The account of this codicil given in the plea, is, that the deceased having sealed the paper up in an envelope, delivered it to Mr. Holloway about a week before her death, desiring it might not be opened till after her will was read. This injunction Mr. Holloway observed, and by his concealment of the paper till after the funeral, he has led to the present investigation. The deceased died on the 25th of March, and the paper was not produced till the 10th or 11th of April, when he showed it to Mr. Parnell, the deceased's solicitor, who prepared her will: he, from the late period at which the paper was produced, could not avoid feeling some suspicion, and took up an unfavourable impression of the instrument, because he knew nothing of the paper before it was thus shown to him; and, undoubtedly, the conduct of Mr. Holloway was extremely incautious.

The deceased, it is true, was very secret: she did not communicate her concerns even to Mr. Parnell, further than his professional assistance was absolutely necessary: and the handwriting of the signature is admitted, by the executor in his answers, to be genuine. The ground of opposition, however is, that the paper was obtained by undue influence. Mr. Parnell will not go beyond doubting the handwriting of the signature—even as to the body of the instrument his reasons are insufficient—he doubts it, because he thinks it is too well worded for the deceased. But here is also another instrument, written a few months before the will, and found in conjunction with it; this instrument—which is signed, and at the bottom has a bequest to the Reverend Mr. Holloway—the party in this cause—is extremely well written and as well worded as the paper in dispute. There is no reason then to suspect any forgery; but yet I do not feel surprised that suspicions should be excited. It appears how-

(a) The deceased, by her will, did not make any provision for the Reverend Mr. Holloway, —but she provided for his mother, and also for his two sisters, and appointed the latter residuary legatees.

ever that this paper was produced, three days after the deceased's death, to a gentleman, the head clerk in the Secretary's department of the Sun Fire Office; and the paper, produced on that occasion, is clearly identified with the codicil in question; though it was not shown to Mr. Parnell, nor produced to Mr. Headington, till some time after the death of the deceased, and after the time had been fixed for Mr. Headington to take probate of the will.

In respect to costs, though the general rule is, that when a party propounds a paper, loco executoris, (see *Williams v. Goude* and *Bennett*, 1 Hagg. 610,) and establishes it, he is entitled to his costs; yet, adverting to the imprudent and unwise conduct of Mr. Holloway; and that the matter of costs is a question more peculiarly left to the discretion of the Court; and further, that the rule as to a legatee having his costs out of the estate on establishing a codicil, is not so general as in the case of a will, I do not think that his costs—occasioned, as they are, by his own delay in producing the paper—ought to fall on the residue. I direct that Mr. Holloway shall pay his own costs; but that the executors shall have theirs out of the estate.

PEDDLE v. TOLLER.—p. 283.

Where a bill of particulars for business done in the Court of Delegates had been recently delivered, though a general account had been rendered, settled, and paid, three years before, the Court, on petition (though such petition contained impertinent matter) directed the bill to be examined by the registrar, in order 1st, that the suitor might decide as to proceeding in other Courts, to recover the excess (if any); 2dly, to found a complaint against the proctor, if the charges were exorbitant or fraudulent; but the Court cannot notice an asserted undertaking that disbursements only, and those not exceeding a certain sum, should be charged; nor will it make an order for the production of vouchers; which, if demanded, are produced as of course before the registrar.

On the registrar's report—that the bill was just and reasonable—and on the proctor for the complainant declaring he proceeded no further, costs against the petitioner were not given, only because he was almost a pauper.

The Court will exert all its powers to restrain proctors from undertaking causes on condition of sharing in the effects, or of any benefit beyond the payment of fair costs.

The Court inclines to discountenance an agreement on the part of a proctor to accept only disbursements from his client—an appellant—as it is the policy of the law to protect both respondents and appellants from useless litigation.

When a detailed bill of costs has been delivered and long acquiesced in, and payment made after the suit was at an end and when the party was not inope concilii, the party would not be entitled to have it referred to the registrar for examination: aliter where the payment took place without a detailed bill, and application for reference to the registrar was made shortly after the delivery of the bill.

A client is under all circumstances entitled to a detailed bill from his proctor.

THIS was a petition presented by William Peddle, one of the parties in a suit entitled *Peddle v. Evans* (a), relative to the conduct of his proctor in that suit; his petition concluded with the following prayer:—"that this honourable Court will order that Messrs. Toller and Son shall produce for the inspection of your petitioner and his present proctor all vouchers, receipts, or other acknowledgments by them or either of them taken on making such payments [those detailed in the petition] respectively, in order that your petitioner or his said proctor may inspect and examine into the correctness of such charges, and be at liberty

to make copies or extracts from such vouchers, receipts, or other acknowledgments as occasion may require, or as he may be advised may be necessary; and that Messrs. Toller and Son may be directed to refund to your petitioner the excess they have received over and above the sum of 200*l.* for their disbursements in the said Court of Delegates, and which was paid them on my account in consequence of the aforesaid (in the petition) misrepresentations of Mr. Toller, of deductions from their bill of business done in this Court, and that in case it shall be found on investigation that their actual and lawful disbursements in the Court of Delegates do not amount to 200*l.*, that they be ordered to refund the full amount of what shall appear they have so received over and above their actual disbursements, and that they be condemned in the costs attendant upon the application."

The nature of the case sufficiently appears from the sentence.

*Phillimore* and *Lee*, for the petition.

*Addams*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is an application of an unusual if not of an unprecedented nature, being a petition by a party against his former proctors respecting transactions in a certain suit begun in 1822, and finished several years ago. This petition alleges, that certain charges, not for business done in this Court but in the Court of Delegates, not contained in a regular bill of costs but made under an asserted special agreement—charges actually paid above three years since—were improper: and the party prays—"that the proctors shall be ordered to produce vouchers of their disbursements; that copies of, or extracts from, the vouchers may be taken: that the proctors may be ordered to refund all they have received above 200*l.* for their disbursements in the Court of Delegates; and, if the disbursements do not amount to 200*l.*, to refund all above their actual disbursements." Such is the substance of the prayer, which is preceded by a detail of all the circumstances happening in the suit, and is supported by the affidavits of the party and his solicitor, and by some correspondence. To this petition an answer was given by the proctors verified by affidavits and correspondence; and, in reply, a further affidavit has been made by the solicitor accompanied by some further correspondence.

The circumstances set forth in the petition and affidavits have now been referred to, and discussed by the counsel on both sides: but those facts only are material for the consideration of the Court which tend to support the prayer of the petition,—all other matters are quite extraneous and irrelevant to the present inquiry. The question, however, is of some importance to the proctors, complained of, personally—to the profession in general—to the suitors of the Court,—the public at large. It may therefore be proper to examine some of the points more fully, than the mere decision of the prayer of the petition may appear to require.

The first consideration is, whether the Court has any and what power to grant the prayer of the petition. The second, what is the proper mode of granting such relief as the Court may have the power of affording.

This Court, like all other Courts, has considerable authority over its own practitioners and officers. This authority forms a part of the jurisdiction inherent in all courts, which they are bound to exercise for the

protection of their suitors against imposition and extortion. The principle has been laid down and acted upon in various instances in the temporal Courts: it will be sufficient here to state one or two cases, though the principle will also appear in some others which will be hereafter referred to for a different purpose. In *Newman v. Payne*, 4 Bro. C. C. 350, the marginal abstract runs thus: "An attorney cannot take from his client a bond for unliquidated costs: notwithstanding such bond and a mortgage have been given, the bills may be taxed, and upon payment the defendant to reconvey—and the bond declared void." The Lord Chancellor said, "I have had no doubt as to the relief in this case: I do not go on any particular rule of equity, but upon a principle that would operate in the same manner in any Court of Law. All Courts will protect their suitors, and attorneys cannot act, in respect to the parties for whom they are concerned, as other persons may do. I have no doubt what a Court of Law would do. The master must tax the costs and take an account of money lent." The same principle of protecting suitors against improper charges is laid down in *Balme v. Paver*, 1 Jacob, 305. These authorities are sufficient to show, that it is the duty of the Court to go as far as it can in relieving the petitioner, if he has any claim to relief: but still that duty is limited by circumstances; it is limited first, by the powers and jurisdiction belonging to the Court; and secondly, by circumstances which may have previously taken place.

What are the powers and jurisdiction of this Court in respect to costs between proctor and client incurred in a contested suit? The Court has no power to decide what is due, nor to enforce payment. Even in common form business in which the proctor is acting more in the character of an officer of the Court, and for which there is an established table of fees, and which therefore is subject to a more direct control, the Court has, of its own authority, no such power: but where costs are given against a party, the Court, in order to carry its sentence into execution, is empowered to tax the costs and to enforce payment: but, as between proctor and client, the Court has no such authority: it can neither decide what shall be received, nor what shall be paid, nor can it enforce payment. The proctor can only recover his charge by action at law, when he must prove the items of his bill. All that this Court can do is, upon the application of the client, to refer the bill to the Registrar for examination. The Court does this for one of two purposes: first, to enable the suitor to judge what he will pay or tender, before bringing the matter into a Court of Law by refusal of payment;—but this is not properly a taxation of the bill: the Registrar does not report the bill to the Court: the Judge does not tax the bill—the proctor first making an oath that the amount reported has been necessarily expended:—nor does the Court issue a monition for the payment of the sum taxed. It has no such authority between proctor and client. The reference to the Registrar is merely in aid of justice, and for the convenience of suitors.

The other purpose is, in order to found a complaint of extortion against a proctor, if he has made out and attempted to obtain payment of an exorbitant bill, or of fraudulent charges.

Whether the temporal Courts had, without the authority of an Act of Parliament, any other or greater authority than is now possessed by this Court of proceeding in a summary mode between solicitor and client, or attorney and party, it is immaterial to inquire; but it is certain that, in

order to regulate such matters, it was thought expedient to obtain an act of parliament under the authority of which, and under certain regulations therein specified, proceedings in the temporal Courts now take place. (See 2 G. 2, c. 23, s. 23.) First, it is upon the party submitting to pay the sum taxed that he is entitled to demand a taxation. Secondly, if he neglects to pay the sum taxed he is liable to an attachment, enforcing payment summarily, or the attorney may still bring his action at law. Thirdly, it is the officer of the Court and not the Judge who is to tax the bill. But there is no such act applying to the Ecclesiastical Courts. Here, after the Registrar has examined the bill the client is not obliged to pay the amount, nor the proctor to receive it, nor can the Court enforce payment. In the present case, this Court (supposing the money had not already been paid) could not compel Peddle to pay the amount which the Registrar might think to be the sum due. The Court, nevertheless, at the prayer of Peddle, is now called upon (as I have before said) to compel the proctor to refund a part of the money already paid for charges in the Court of Delegates,—not upon a regular bill of costs made out as between proctor and client, but upon an alleged undertaking to charge only disbursements out of pocket, and upon a further alleged undertaking that such disbursements should not exceed 200*l*. The demand of producing vouchers I will consider presently. Upon the other question,—whether the Court can compel the proctors to refund any and what part of the money received,—Peddle has gone into the whole history of what passed either by letter or otherwise between his solicitor, Walker, and Messrs. Toller from the commencement of the cause in 1822 to the present time: and all the supposed understandings during the course of that period, all the inferences that can be raised, and all the imputations that can be made, are brought forward. It is not, however, necessary for the Court to travel through them: they bear very little, if at all, upon the decision of the main question: but it may be remarked, that in the whole of this history Peddle's name seldom occurs, till the costs are finally to be settled, and then the unfortunate client is brought prominently forward as the person upon whom the hardship is ultimately to fall. Walker, his solicitor, seems pretty much to have decided every thing for himself upon his own judgment as if he were the real party; for, as a solicitor, he was not very competent to form a proper judgment upon the expediency either of undertaking a suit, or of prosecuting an appeal in an Ecclesiastical Court. Mr. Toller in his answer states, and he has verified it upon oath, that he verily believes Mr. Walker was interested as a party. "He verily believes that Charles Houlden Walker had entered into an agreement with William Peddle that he should carry on the said suit at his own risk as to the costs, and in the event of success therein to divide with him, William Peddle."

Mr. Walker, though he has made a long affidavit of several sheets of paper, very argumentative and very inferential, yet he has not ventured to contradict this very important fact, and the *res gestæ* tend strongly to confirm its truth. This practice of an attorney "buying a cause," or participating in the property to be recovered is most dangerous to public justice: (a) it exposes the adverse parties to the harassment of most vexatious litigation. How other Courts may consider such a matter I will

(a) See as to *Champerty*, and the punishment thereof, Com. Dig. tit.; *Maintenance*, (A. 1 & 2), and (C. 1 & 2), 4 Bl. Com. 135. Also *Wood v. Downes*, 18 Ves. 120.

not stop to inquire, but if any practitioner in this Court were to undertake a cause upon condition of sharing in the effects, or of receiving any other benefit beyond the payment of his own regular, fair bill, I should think it would call for the utmost powers of the Court to prevent the recurrence of such bargains, and to repress such a practice. The Court takes advantage of this opportunity to express publicly that opinion.

In respect to the imputations against the proctors: they knew nothing of Mr. Peddle, nor of his cause, except from the information of Mr. Walker, and Mr. Walker himself was a new client, introduced to them by a respectable Agent's house in this town, Messrs. Adlingtons and Gregory—old clients of the Messrs. Toller. There was at the outset, therefore, no claim upon the proctors to depart from their usual course of practice. The proctors, however, do not urge their client into the cause: on the contrary, at an early stage of it, they recommend a compromise in a letter to Walker on the 2nd of October, 1822, taking a very judicious and liberal view of the cause and its probable result. The compromise was prevented by the advice or decision of Walker: and a very expensive suit for a small property was the consequence. The sentence was unfavourable to Peddle, and it was unsatisfactory to his law advisers. The case was one of great intricacy—of much conflicting evidence—of considerable difficulty—of so much difficulty that it was a matter of consolation to the Judge that his sentence might be revised by a superior tribunal, except that the property was but small. The Court of Delegates affirmed the sentence but without costs; except that as to the expenses arising from offering, in that Court, an exceptive allegation on behalf of Peddle, he, Peddle, was condemned in costs. The offering of that allegation however was communicated to Walker, nor could that plea have been given in without being settled and supported by counsel.

It is suggested that Mr. Toller excited the appeal and expressed his conviction that the sentence would be reversed, and undertook to accept his mere expenses out of pocket. Here happens to be Messrs. Tollers' letter to Walker, dated 27th November, 1824, expressed in very correct terms and very far from urging on an appeal. The letter acknowledges the receipt of 200*l.* on account, in the cause of *Peddle v. Evans*, and thus concludes: "The opinion of Dr. Adams coincides with our own—that the decision of Sir John Nicholl is wrong; but neither he nor ourselves can say whether the Delegates will reverse the decision." This is quite correct: they are acting in concurrence with the opinion of their leading counsel: and they had previously, viz. on the 23rd of September, 1824, suggested the expediency of a compromise.

In respect to the agreement to accept mere disbursements, it at least shows the sincerity of the proctors in their opinion, and hopes, that the sentence would be reversed: but I much doubt the public policy of such undertakings, and the propriety of giving them any countenance or judicial recognition. An able and experienced proctor may form a strong opinion that a sentence is erroneous and that opinion may be right; but, whatever be the condition of the party in the cause, and however strong the opinion that the sentence is erroneous, the correct course, in my judgment is, to wait the result of the appeal before undertaking to accept fees out of pocket instead of the regular charges. The proctor may then, without injury to the adverse party, exercise his liberality as extensively as he pleases: but the policy of the law is, to pro-

test both parties—respondents as well as appellants—from useless litigation: and no party should be excited to appeal without the ordinary check of the risk at least of his own costs, and possibly of those of the respondent. By these observations no blame is meant to be imputed to the proctor in this particular case, for agreeing to take disbursements out of pocket: it is possible that it is not unfrequently done from very kind and liberal motives,—but observe the injury to the other party, which is apparent in this very case: the respondent, though successful in both Courts, has probably expended the greater part of the stake in the litigation. Upon public grounds, therefore, I doubt the propriety of these agreements to accept mere disbursements as an inducement to an appeal.

But this is quite clear: that this Court has no power of deciding upon, and enforcing such an agreement. The Court can only proceed in the regular and ordinary way to direct the bill of costs to be examined by the Registrar, and that it ought to do, unless there be some reason to bar and preclude the suitor from being assisted by that examination. Still less can the Court take any notice of another matter that has been suggested,—namely, a sort of understanding that the disbursements should not exceed about 200*l*. This Court will not decide upon that question further than to say, that the whole conduct of Mr. Walker is inconsistent with any such agreement. He would not have suggested a higher fee to the common law counsel without at least some reference to the limit of 200*l*: but what seems more conclusive, he never would have agreed to pay 350*l*., the balance of the account in which the disbursements are distinctly charged at upwards of 300*l*.

In respect to what is stated in this long affidavit about the bill in the Prerogative, this Court must consider that question as completely closed. First, because no part of the prayer of the present petition applies to it: secondly, because the bill had been long ago delivered, and after certain allowances was actually paid by the solicitor, Mr. Walker: but further, a year after payment, Walker desired to have the bill for the business in the Prerogative taxed: Mr. Toller consented, and an appointment was made with the Registrars: but because Mr. Toller objected to the attendance of Mr. Walker, as Peddle's solicitor, and because the Court, after hearing the case and inquiring of the Registrars as to the usage, refused to make any order to allow the attendance of Mr. Walker, as solicitor, the matter was dropped. (See *Peddle v. Evans*, 1 Hagg. 684.) Mr. Walker would have had full opportunity of instructing Mr. Peddle's proctor, or of proving by his affidavits, any facts in objection to the charges contained in the bill: but because his claim of right to attend as solicitor was overruled, that part of the case was abandoned and the present petition is now brought forward with all these statements and affidavits, in order to do what?—to support a demand for the production of vouchers and for permission to take copies of them, so far as they relate to the disbursements in the Court of Delegates: and in what mode is this required? by a letter from Mr. Walker to Mr. Toller. As Peddle is nominally appearing by his proctor, the latter, whose duty it was to have written any such notice, would find it difficult to justify his conduct in allowing Mr. Walker to interpose and write that letter. If Peddle had employed his proctor to make that demand, his proctor would have known, or at least he ought to have known, that upon the bill being referred to the Registrars for examination, the vouchers or other proofs of

payment would have been produced as a matter of course, if demanded. Why therefore this unusual mode was adopted it is difficult to say, unless the object be to compel this matter to proceed out of the regular course.

The question then is, whether the Court can and ought now to put the matter in a train to afford the petitioner an opportunity of being satisfied that these charges are true and proper. If a regular and detailed bill of the costs and charges in the Delegates had been sent with the account current, I should have held that the payment which took place would, after such long acquiescence, have precluded the party from a taxation. But here was no detailed bill delivered till the third of July instant. Before that time it was impossible the party could ascertain whether the charges had been fairly made or not, though Walker had paid them. Even where there is actual payment, other Courts will under some circumstances still order a taxation: but only on strong grounds. One ground is, where the client has paid the bill in the course of the proceedings—under their pressure—inops concilii—without advice—and subject to the influence of his solicitor. Such was the case of *Crossley v. Parker*, 1 Jac. & Walker, 460, before Sir Thomas Plumer, then Master of the Rolls. But here the bill was paid long after the suit was at an end, and so far from the party being inops concilii, it was paid by his solicitor to whom he had intrusted the whole management of the suit and of the payments. Another ground for opening and having the bill taxed after payment is, where some strong and clearly improper charge is discovered and pointed out. *Wilkinson v. Foster*, 7 Moore, 496. *Plenderleath v. Fraser*, Ib. notis.; and 3 Ves. & Beames, 174. *Langford v. Nott*, 1 Jac. & Walker, 291. How do these cases apply to the present? Here is no improper charge of any importance even suggested. It is admitted, that the disbursements in the bill delivered amount to about 329*l.*, without any charge for the proctor's own professional assistance: and it is stated and proved that they offered to allow Mr. Peddle's proctor to see their books: there was, therefore, no concealment of the items; it was rather a point of punctilio that they would not, when so called upon, deliver a bill. Now I think that in this respect the proctors were wrong. I think the party was entitled to a detailed bill from the first, and whenever required: it was impossible to ascertain the truth and fairness of the charge without such a bill: and, however affronting and insulting such a demand might be, I think it ought to have been complied with.

A bill was at length delivered on the third of July; and instead of the petitioner merely applying to the Court desiring that the bill so delivered might be referred to the proper Registrar for examination, Mr. Walker, on the 5th of July, wrote a letter to Messrs. Toller and Son demanding the production of vouchers, and requesting that either he or Peddle might take copies of them. No answer being returned, this long petition and affidavits were presented; and all these transactions were gone into at no inconsiderable length: and, I must add, without much necessity or propriety.

It remains for the Court to see what can be done, in order to arrive at true justice between the suitor and proctor.

The Court is bound to afford every suitor all just protection. It is no less due to the proctor: but such protection can only be afforded accord-



ing to the limited powers of the Court and according to the regular course of proceeding. This Court cannot enter into, nor decide upon special agreements for disbursements only, and that such disbursements should not exceed 200*l*. Those agreements if validly made must be set up and enforced in other Courts. On the other hand, though the account was rendered and actually settled and paid above three years ago, yet as no bill of particulars were delivered until about three weeks ago, I think the Court, if still desired, is called upon to refer that bill to the proper Registrar for investigation. Under that examination the various charges made will be considered and proved by proper vouchers. If any of the charges shall be found gross and fraudulent (which is in no degree probable), it may not be too late for the party to seek a remedy in other Courts, by bringing his action for the amount of any sum that he may have overpaid, or by such other means as he may be advised there to have recourse to: but this examination must take place in the regular and ordinary course: it is not a case in which the Court ought to depart from its usual forms. The charges have been incurred in the Court of Delegates; the Registrar of that Court seems to be the proper officer to examine the bill. If, however upon application to him, he declines to act, as this Court has no authority over him as Registrar of the Delegates, it will then direct its own Registrars to examine the bill delivered. When the Court has proceeded thus far, it will have done every thing that it has the power to do for the protection and assistance of the individual suitor; though should the charges turn out to be gross and fraudulent, which, as I have before said, is in no degree probable, the Court may still have the power to correct its own practitioner by suspension or otherwise; and thus, by the example, protect other suitors from similar misconduct.

In respect to the costs of this petition, I shall reserve them until the investigation has taken place: if the charges, made in one item, shall turn out false and fraudulent, the petition, though erroneously brought in this voluminous form, will be justified by the result: but if the charges turn out fair, the petition, both in its mode and in its substance, will have been frivolous and vexatious, and will call for costs against the petitioner.

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On the first session of Michaelmas term, the Registrar of the Court of Delegates reported, that Messrs. Toller's bill was just and reasonable.

The proctor for Peddle then applied to be heard on his petition in objection to the report, and was accordingly directed to enter into an act on petition: but on a subsequent Court-Day, he waived his act on petition and declared, that his party proceeded no further.

*Addams*, for Toller, moved, that Mr. Peddle be condemned in the costs of the original petition.

*Per Curiam*.—I shall make no order for costs, but I forbear solely on the ground that Peddle is almost a pauper, and that it cannot be worth Mr. Toller's while to attempt to enforce costs. The Registrar's report, to which it is now admitted no objection can be made, has proved that there is no foundation for any imputation on Mr. Toller's conduct respecting these charges. His character, therefore, stands completely cleared from the aspersions which have been attempted to be cast on it by these proceedings.

*Addams* said:—Mr. Toller was quite satisfied with the manner in which the Court had disposed of the question.

Petition dismissed.

## CONSISTORY COURT OF LONDON.

DUINS v. DONOVAN, Otherwise DUINS.—p. 301.

### *On Admission of the Libel.*

Lapse of time offers no bar to a suit for nullity of marriage, by licence, by reason of minority and want of consent of the father. An entry of baptism in 1820, (the marriage taking place in 1813,) reciting, that the party was "said to be born in 1795," is not admissible—either as proof of the non-age, or in order to prevent a suspicion of suppression of evidence. A letter from the father—two months after the marriage—expressive of his anger at the marriage is admissible as part of the *res gestæ*; and a subsequent *de facto* marriage of the woman with another man is pleadable to show, that the parties did not live together as husband and wife.

CROFT v. CROFT.—p. 310.

### *On Admission of the Libel.*

Where a libel pleaded facts, 1st, to establish the adultery of the wife; 2nd, to show that the husband had not forfeited his claim for relief by misconduct, the Court directed parts to be reformed on the several grounds of too great minuteness, hearsay, and pleading the contents of a letter—not exhibited, nor accounted for; and admitted the rest.

In considering the admissibility of pleas, the Court must be cautious not to exclude matter essential to a due decision, nor allow proceedings to extend to an unnecessary length; but if a serious doubt arises as to the ultimate effect of any averment it should be admitted.

Though the Court will not, on presumption and in the absence of matter strongly inculpatory, impute connivance to the husband, it will not debar him from pleading that which makes the history consistent and natural.

That the conduct of the wife, during the absence of her husband, was so indecorous as to induce a lady, with whom she resided, to recommend her removal to her mother, is pleadable.

On a negotiation between the husband and third parties, in the wife's absence, relative to his receiving her back,—that the husband declined, as it did not appear that her conduct had changed, is not pleadable when unnecessary to his justification.

Where parties are living separate, the commencement of the acquaintance with the alleged paramour, and of the suspicions of the person under whose care the wife was, should be set forth circumstantially.

Where the wife engaged in an improper communication with the paramour, was compelled to retire, the whole transaction may be pleaded.

Where a letter is pleaded to be in the possession of the adverse party, the contents may be set forth at length, leaving the other party, if she pleases, to produce the letter.

A declaration of the paramour, in the wife's absence, that she had committed adultery previous to the adultery charged in the libel, is not admissible; but a declaration, in her presence and confirmed by her, is: and the Court cannot reject it on the ground of its reflecting on third parties, nor that it does not establish adultery previous to the charges in the libel.

THIS was a suit by reason of the adultery of the wife. The marriage took place on the 9th of September, 1824, the lady being a minor: of this marriage there was born one child—a daughter. The parties cohabited till April, 1828. The libel pleaded an action,—Judgment by default,—Verdict for plaintiff,—damages 2500*l.*: and a continuance of criminal intercourse at the time of the present suit.

*Dodson and Nicholl*, opposed the libel.

*The King's Advocate* and *Phillimore*, contra.

JUDGMENT.

DR. LUSHINGTON.

To the admissibility of this libel, generally, no objection is raised. It is said, however, some parts of it are unnecessary for the purposes of justice, and that other parts, according to the established rules of evidence, ought not to be received.

The practice of objecting to the admissibility of pleas, in the whole or in part, is one of the most wholesome and beneficial usages which can prevail in any Court; and is a practice resorted to in these Courts more frequently, and in a more convenient manner than in any other Court: it is attended with little expense, and it occupies but little time, except perhaps upon some occasions when the whole question, and the result of the suit, are to be determined by the rejection or admission of the plea. When the facts of the case are not disputed, but when legal questions of importance arise, on the decision of which the question at issue depends, nothing can be more advantageous or convenient to suitors than the practice of considering, in this early stage of the proceeding, the application of the law to the facts pleaded, and of thereby disposing of the case without putting parties to the expense of going into evidence. Beneficial, however, as this practice is, it often entails upon the Court the exercise of an arduous and difficult duty: on the one hand, the Court must be cautious not to exclude any matter essential to the due decision of the case, and, on the other, not to allow proceedings to extend to an unnecessary, inconvenient, and expensive length. The better and more discreet line to be adopted, is,—if a serious doubt arise as to the ultimate effect of any averment in a plea—to allow it to stand and come before the Court in proof: for then the utmost extent of mischief is to occasion some additional expense; while, wholly to exclude the averment, might work absolute injustice.

I have thought it not unimportant to make these observations, as it is desirable that suitors should know that, here, they will receive at least as great advantages as they can elsewhere, in the exclusion of irrelevant or redundant matter; and in bringing a case to the narrowest and most simple issue which justice will allow.

The objects of this libel are twofold,—first, to establish the adultery of the wife; secondly, to show that the husband has not, by misconduct, forfeited his right to apply to the law for redress. In respect to the second point, the Court has occasionally remarked, that it would not, on presumption, and in the absence of matter strongly inculpatory, impute to the husband the guilt of connivance; but, it never meant by any such expressions, to debar him from pleading circumstances, that make the history natural and consistent; for the party ought not to be forced ultimately to depend, for an explanation of his conduct, on the ingenuity of counsel, or the discrimination of the Court.

Some peculiarities present themselves upon the face of this plea. The marriage appears to have been contracted at a very early period of Lady Croft's life; the courtship having commenced when she was about seventeen years of age: the cohabitation continued from September, 1824—the date of the marriage—until April, 1828, when Sir Thomas Croft, in consequence of ill health, was under the necessity of going into the country. On that occasion Lady Croft declined to accompany him;

and she remained in London confided to the care of Sir Thomas Croft's mother: and it is impossible to suppose she could be under safer or better protection. It is objected that the fourth article of the libel—which pleads “her improper and indecorous conduct during her residence with her mother-in-law, and that the latter recommended, that she should be placed, during her husband's absence in the country, under the care of her own mother,”—goes too much into detail; and that the opinion, or recommendation, of the husband's mother, affords no legal evidence as to her conduct: but I think it desirable, that the Court should be in possession of *the fact*, that, during the necessary absence of her husband, and while under the roof of her mother-in-law, Lady Croft so comported herself as to induce that lady to advise her removal to what many persons might conceive a safer and more effectual protection—viz. the protection of her own parent.

The 5th article pleads, “That from the end of April, 1828, until October of the same year, Lady Croft frequently expressed the strongest dislike of her husband and his family; and conducted herself with unbecoming levity and indecorum, that Sir Thomas Croft expressed a wish that she should remain under the care of her mother until she manifested a proper sense of, and contrition for, her misconduct, and a permanent inclination to return to her duty to her husband and child.” No objection has been raised to the admission of the first part of this article, but the remainder of it is objected to; and which pleads, “That in the beginning of September, 1828, Sir Thomas Croft, who had then somewhat recovered from his illness, had a meeting with R. M. [Lady Croft's step-father,] and with T. H., a friend of his wife's family, and a trustee under her marriage settlement, relative to Sir Thomas Croft taking his wife back again, but as it did not appear that her conduct and behaviour had undergone any material alteration he declined at that time to receive her.” I am of opinion that this part of the article may be very easily spared; I do not think it essential to the justification of Sir Thomas Croft, and it relates to transactions which took place entirely without the knowledge of the other party.

The 6th article, after pleading, “that in October, 1828, R. M. his wife and family, accompanied by Lady Croft, took up their residence at Boulogne; that in June, 1829, they there were introduced to William Lyster, who passed and was generally known by the appellation of Colonel—an unmarried man then living at Boulogne,” alleges that, “On the 14th day of July, 1829, R. M., his wife, and Lady C. dined at Boulogne with Mr. and Mrs. B., and that Colonel Lyster also dined there. That on such occasion the said Lady C. and Lyster paid marked attention to each other, so as to attract the notice of her mother, who, on the next morning, mentioned what she had so observed to Lady C., who denied the truth thereof, or that Lyster had said any thing that was improper to her.” Some objection was raised to the particularity with which the commencement of this acquaintance is pleaded; but it appears to me that, in this case, it should be set forth in rather more particular terms than might be requisite, had the husband and wife been living together; and the Court should also be apprised of the earliest period at which the conduct of Colonel Lyster excited the observation and attention of Lady Croft's own mother, under whose protection she was at that time residing.

Objections have also been taken to the 7th article, which, in substance

pleads, "That on the 16th of July, R. M. and his wife, accompanied by Lady C. went to a public concert at Boulogne: that at the concert L. came and sat by Lady C.; that after the concert was over, Lady C. retired to her bed-room, remained there about an hour, and would not allow her servant to put away her bonnet and shawl; that R. M. was apprised thereof, and suspecting that Lady C. had formed some plan, watched her." The objection goes principally as to the language in which the article pleads R. M.'s having been apprised of certain circumstances, and his suspicions as to what was about to follow: but the party would not be in the least benefitted, if a few words as "apprised and suspected" were struck out, for the evidence would be in effect the same. It is unnecessary, therefore, that any alteration should be made in that respect. The latter part of this article is also objected to: it pleads, "that R. M., from a room above, observed Lady C. had opened her window, and kept looking up and down the street as if she expected to see some person; that Colonel L. came under the windows of her room, and entered into a conversation with her; that R. M. thereupon went into her room, and having sent her to her mother, directed the maid-servant to look out of the window, when Colonel L. in a low tone of voice, said to her, If the street-door makes a noise when opened, open one of the lower windows and shutters; or to that effect: that R. M. thereupon directed the maid-servant to tell Colonel L. that he knew of his being there, and to go away, which, after some hesitation, he did." Now it is said that this took place in the absence of Lady C., and cannot be admitted as an instance of her guilt, nor as auxiliary proof. It is certain, however, that a conversation ensued under the window, between the maid-servant and Colonel L. after the previous facts had occurred; and this, I think, ought to be received, because it is a continuation of that which must be admitted to have been an impropriety on her part: and the transaction would be incomplete, unless the whole of it were set forth, and allowed to go to proof.

The 8th article is objected to, on the ground that it states with too much particularity the cautions adopted by R. M., in order to prevent any intercourse between Lady C. and Colonel L.; and I think these are pleaded at unnecessary length; and that it would be quite sufficient to plead, generally, the measures of security and precaution to which R. M. resorted: this will show that he adopted all those measures which he deemed requisite. With respect to the communication to Sir Thomas Croft of his wife's conduct,—that appears to me to be properly stated; for I think it is desirable that the Court should be put in possession of Sir T. Croft's behaviour upon the receipt of that communication.

The 9th article contains and sets forth a letter of Sir T. Croft, and also Lady Croft's answer. This latter letter is annexed to the libel; but, of Sir Thomas Croft's letter, the original is not produced, nor is there any draft or copy; and it is said therefore that the contents cannot be properly pleaded *verbatim et litteratim*; for that it will be impracticable to prove them. To a certain extent it may be true, that it may be impracticable to prove that a letter, precisely of the same contents, was written by Sir T. Croft, and delivered to Lady Croft; but supposing, that there should be this failure of evidence, no use can then be made of the letter; and Lady Croft will not suffer the least injury from its admission in plea. The original letter is alleged to be in her

possession; it is not possible, then, that Sir T. Croft can now obtain possession of that letter, unless Lady Croft will produce it. If it were in the hands of a third party, the possession of it might possibly be obtained: but I am of opinion that, being in the wife's possession, the husband may plead either passages from, or the contents of, the letter, and may substantiate them as best he can, leaving it to the other party to produce the letter, or not, as she may deem advisable. The answer is strictly admissible as evidence against her.

The 11th article—after pleading “That after Col. Lyster had been detected in carrying on the clandestine communication with Lady C. as pleaded in the 7th article, he made complaints to various persons, that she was improperly confined by the said R. M., and threatened to apply to the British Consul and French Authorities to interfere and protect her”—goes into a considerable detail which has been objected to; and which in the judgment of the Court, it is unnecessary to plead. It will be quite sufficient to state, that, under the circumstances, R. M. thought it right to remove Lady Croft from Boulogne, and to place her under the protection of her mother. The remainder of the article pleading his embarkation with Lady C., and that notwithstanding his precautions, Col. L. was a passenger on board the same vessel, may go to proof.

The objections to the 12th article, have been argued at great length. It pleads:—“That, whilst on board, Col. L. several times addressed {declared to R. M.} *R. M. on the subject of the intercourse which he stated had been carried on between him and [in the presence of Lady C.] Lady C. and in her presence he declared (a),* and she admitted the same to be true, that he and Lady C. had had sexual intercourse at Boulogne on four different occasions previous to his being discovered talking to Lady C. as pleaded in the 7th article: That, on their arrival in London, M. proposed to Lady C. to go to the Bridge Street Hotel, until he could consult T. H., her trustee: that L. objected, and said, ‘he and Lady C. intended to go to another hotel, but would meet M. at H.’s office the next morning;’ that M. refused to leave Lady C. till he had first seen H.; and Lady C. declared she would not see him unless L. gave his sanction.’ It then pleaded that the three went to H.’s, that he was from home, that Lady C. again refused to go to the Bridge Street Hotel, but went to the Percy Hotel; and that M. remained there with her and L. till late in the evening, when H. came, and he and M. retired to confer: on returning to the room where he left Lady C. and L., that neither of them were therein, *and he was then informed ‘they were together in a bed room in the said house;’* upon which he instantly quitted the house, and, having been informed by H. that the husband had left England, he directed H. to apprise the husband’s family of the improper intercourse between Lady C. and Col. L.”

It is said, that admitting such a statement was made, it is not necessary for the purposes of justice; and that it reflects very seriously on the character of the paramour who is not a party to this suit. Again, that no adultery is pleaded to have taken place at any anterior period; and therefore, that the Court could not take this conversation as evidence of the actual commission of any guilt at Boulogne with which the wife was not then, nor is now, charged. It is further objected, that

(a) The parts in italics were struck out, and the words in brackets substituted.

part of this conversation is not pleaded to have taken place in the presence of Lady Croft. Now the Court is of opinion that it would have been admissible if, at the commencement of this article, it had been pleaded more specifically that the conversations which did pass between Colonel Lyster, and R. M., had taken place in the presence of Lady Croft: but, if they did not take place in her presence, then I am of opinion that the objections are thus far well founded, and that it is the duty of the Court to reject any conversations which passed in the absence of Lady Croft: but as the objection to the other part, that, which alleges the declarations of Colonel Lyster, in Lady Croft's presence, that sexual intercourse had taken place between himself, and Lady Croft, and that she admitted that such was the fact, I am at a loss to conceive on what principle the Court would be justified in rejecting it. With respect to the consequences that may result to third parties, however much the Court may regret if any injustice or misfortune should accrue to them, yet justice must be done to suitors; so that, it is impossible to exclude matter which ought to be admitted in evidence, because, incidentally, it may affect the character and involve the conduct of those who are not parties to the suit. The rejection of matter, on any consideration of this kind, would lead to great inconvenience and injustice.

But another ground of objection is, that the declarations will be no evidence of the previous commission of adultery, and that deserves a little more consideration. Now suppose that the declarations were false; (and it is not at all impossible from the *res gestæ*, and from the manner in which the conversation is set forth in this libel, that actual connexion had not taken place between these parties until after their arrival in London, but, that Colonel Lyster, if he did so declare, did it for the purpose of obtaining more free and unrestrained access to Lady Croft), yet still the conversation would be the strongest proof of what the ultimate intentions of Lady Croft were; and if it should turn out to be a case in which any doubt at all should arise as to the actual commission of adultery, it would be very auxiliary testimony as proving the animus and object with which she allowed any communication whatever between herself and Colonel Lyster. It is therefore my duty to admit, substantially, this article.

The Court is entitled to exercise a discretion as to what parts of a libel may, or may not, be unnecessary, yet it is a discretion very considerably restricted. It cannot exclude substantive facts. If twenty facts of adultery were pleaded, though one might be sufficient to entitle the husband to his remedy, the Court would hesitate before it struck out one of them. It cannot foresee to what extent the husband is in possession of evidence, nor in what particular instances the averments of the libel may be proved; and it would be extremely dangerous, and I apprehend, going beyond all precedent, if it were to strike out that which must be admitted to be a very material point towards enabling the Court to arrive at a satisfactory conclusion on the case. The few words, towards the close of the article, which plead the information as to Colonel Lyster and Lady Croft being in a bed-room together have been properly objected to as hearsay, and must be expunged. 124

The other objections are not very material: one, however, it may be proper to notice; it arises on the 13th article, which commences by pleading—"That on the evening of the said 7th of August, Lady Croft wrote and sent in the name of R. M., but without his privity or con-

currence, to her maid servant, directing her to come to her at the hotel." In respect to this, according to the strict principles of evidence the contents of a note cannot be pleaded, without annexing the note. As this is an important rule of evidence, though it may be of no very great consequence on the present occasion, that article must be reformed. It is extremely desirable that rules of evidence, which are acted upon by courts of a superior jurisdiction, should be here observed. When these alterations have been made, the libel may go to proof.

Allegation to be reformed.

*Note.*—The case upon the evidence was fully proved; and there being nothing, in the slightest degree, to bar the husband of the remedy he prayed, the Court signed the sentence of separation.

### DE BLAQUIERE v. DE BLAQUIERE.—p. 322.

Where both parties have long abstained from applying to the Court—the one for a reduction of alimony, the other to enforce the regular payment,—It will not enforce arrears, nor inquire as to the sums paid by the husband for his wife's debts incurred by reason of non-payment of that alimony; nor will it reduce alimony on account of an express waiver of a part thereof by the wife,—the additional expenses of the husband occasioned by the mature age of children—the failure, from the mismanagement of her trustees, of a portion of the funds set apart for the wife's alimony,—or slight additions, aliunde, to her means.

Alimony is allotted for the maintenance of the wife from year to year: the Court, therefore, will not, without sufficient cause shown for the delay, enforce payment of arrears beyond one year prior to the motion.

In May, 1820, a sentence of separation, by reason of the adultery of the husband, having been signed, (3 Phill. 258,) the Court decreed that Lady Harriet de Blaquiere should receive for her separate maintenance, in addition to the interest of 6000*l.*—her own fortune—then producing 300*l.* per annum, a further sum of 80*l.* per annum being a moiety of the annual estimated value of Hill House farm, near Cuckfield, the residence of General de Blaquiere. (a)

The present question originated in an application, on his behalf, for a reduction of this allotment; and in support of it, a joint affidavit was made by himself and his housekeeper—who kept the accounts of, and whose husband managed, the Hill House farm, in which both stated, "that it never produced any profit." The affidavit also embodied a letter from Lady Harriet to the General's solicitor in terms following:—

"Sir,

June 29, 1822.

"As I find there is not a clear understanding with regard to the additional 80*l.*, and that my intention of leaving the payment of it to General de Blaquiere's equity subjects me to continual family discussions, terminating in unpleasant differences, I consider it best to dispose of the contention altogether, and I beg you will from this moment understand that I entirely relinquish that specific sum of 80*l.* per annum, reserving the remaining annual amount of 300*l.* for life."

The affidavit then stated, "that, till November, 1823, Lady Harriet received 300*l.* per annum, when a mortgage of 4000*l.*—part of her settlement money—was paid off, and invested in Exchequer bills at a

(a) General de Blaquiere was entitled for life, to the interest of Lady Harriet's fortune; but, upon a private separation in 1814, he agreed that she should receive it for her support. The permanent alimony was allotted upon a joint income amounting to 1,190*l.* per annum; and there were two sons of the respective ages of eight and six.



diminution of interest of 58*l.* 13*s.* That in July, 1824, her solicitor, together with her trustees, (to whose management the settlement money was intrusted) lent this 4000*l.* in equal moieties upon mortgage, and that he (De B.) had conceived Lady Harriet was in the receipt of 300*l.* per annum, but that lately he had been informed and believed, that for the moiety lent to Mr. White, no interest for two years and a half had been, and that none was likely soon to be, paid: that he had incurred great expense in the repairs of his farm, that his sons were wholly maintained and educated by him, and were now of an age to be advanced in a profession, and that his whole income, including the interest of Lady Harriet's money, was 958*l.* 7*s.* 2*d.* That in 1826 Lady Harriet received—as derived under her mother's will—two separate sums of 666*l.*"

Lady Harriet's affidavit set forth a letter from her, dated July 13, 1820, to the General, in which she proposed, "that if he would allow one son to be with her altogether, she would release him from the payment of 80*l.* of her alimony to enable him to bestow a better education upon the other." This proposal was not acceded to, and the General declined allowing Lady Harriet to have any intercourse with her children. That in answer to several applications for the payment of the 80*l.* as it became due, the General, in March 1821, wrote "that he would, as soon as his estate was sold, pay the arrears and provide for the regular payment of it in future." "That Lady Harriet agreed to wait his own time, but expressly refused to relinquish it; and that her letter of 29th of June, 1822, was written when her mind was greatly excited by discussions with her own family, in consequence of her having so far acceded to General de B.'s wishes as to defer receiving payment of such additional alimony; but that she was more especially induced to write it, in the hope that he would comply with her most anxious wish to see her children, and to have them occasionally with her, and in the full impression and belief, that if he should persist in a refusal, her declaration would not be binding. That the balance of alimony, up to 16th May, 1829, was 1,265*l.* 4*s.* 8*d.* That on the payment of the mortgage of 4000*l.* the Exchequer bills were deposited in the joint names of her solicitor and the solicitor of General de B.; with whose full concurrence (a) and that of the trustee on the part of General de B. (b) the money was again lent out on mortgage; that she received in July, 1826, a legacy of 666*l.* 13*s.* 4*d.*, but neither then, nor at any other time, the whole, or any part, of a second sum of the like amount."

In reply to this affidavit, General de Blaquiere made a further affidavit, stating that, since 14th February, 1829—the date of his former affidavit—he had paid upon actions by tradesmen on account of bills incurred by Lady Harriet for furnishing her house at Brighton, taken in 1824, and for other bills, 1,288*l.* 15*s.* 5*d.*, and that he was threatened with further actions for other debts to the amount of 140*l.*; that she has, for life, apartments in Hampton Court Palace, and lets her house at Brighton for four guineas per week; amounting to 218*l.* 8*s.* per annum: that from June, 1822, to March 1828, no intimation was ever made by Lady H.,

(a) This gentleman was dead; but in Lady Harriet's solicitor's affidavit it was sworn, that General de Blaquiere's solicitor had approved of the security, and that the mortgage deed was prepared by an eminent conveyancer.

(b) This was denied in the affidavit of the trustee—who said, "that the sum of 6000*l.* and the receipt of the interest thereon for her use, was entirely under the control and management of Lady Harriet's own solicitor; and that till December, 1828, he, deponent, was wholly ignorant, as he believes were also both his brother and his then solicitor (now deceased) that any part of the sum of 6000*l.* had been lent upon a security—doubtful or unproductive."

either to him, or, as he believes, to his solicitor, that she did not consider her letter of 29th June, 1822, binding upon her: that there now remains justly due to him, for sums paid to her or for her use, 1,286*l.* 15*s.* beyond what she was entitled to as alimony: that he therefore trusts that her Ladyship's income may be reduced suitably to the diminished income of the deponent, and the increased heavy claims which fall upon it."

*Phillimore* and *Addams* for General de Blaquiere.

The *King's Advocate* and *Dodson*, contra.

JUDGMENT.

DR. LUSHINGTON.

In 1820, Lady Harriet De Blaquiere obtained a sentence of separation by reason of General De Blaquiere's adultery; and, on a consideration of all the circumstances, there was an allotment of alimony of 80*l.* per annum, in addition to the interest of 6000*l.*—her own fortune, which, at that time, amounted to 300*l.* per annum. Until last year there had been no application to the Court by either party,—on the one hand to reduce the allotment, or, on the other, to enforce the payment of arrears: either party might have proceeded to take the remedy afforded by the law. An application is now made by General De Blaquiere for a reduction of alimony; this is met by an affidavit of Lady Harriet's, stating a diminution of the funds which had supplied her separate maintenance; and making a counterdemand for certain arrears: in reply it is said, that General De Blaquiere has incurred great expenses on account of debts contracted by Lady Harriet;—that she has received an increase of income from other sources; and that the defalcation in her means, if any, has proceeded from the mismanagement of her own trustees.

It is true, that, should I decree the payment of arrears, General De Blaquiere would be entitled to a deduction for all sums paid on account of Lady Harriet's debts; and I should then be obliged to take into my consideration the questions that have been raised respecting the 80*l.* per annum, which was allotted in addition to the interest of her own fortune. I am of opinion that she did, in fact, abandon that subsidiary allotment; but I doubt whether, in law, it was competent for her, in that form, to relinquish the benefit of the decree of the Court. This is a contract between husband and wife; and though the principles applicable to such contracts are not strictly the same, after a legal separation, as they may be regarded while the parties are living together, yet they are not widely different. In the one case, here is the influence arising from affection; afterwards an influence of a different sort, arising from an anxiety to communicate with her children. If it were necessary to settle this point, I should be of opinion that the whole alimony, decreed to her in 1820, must be placed at her disposal, and then she will be at liberty to appropriate it as she pleases.

In respect to the mortgage for 2000*l.*, upon which but little interest has been paid, I cannot exactly agree that it was in the power of the husband to relinquish all care and superintendence of that sum; it was his duty to see that the money was advanced upon proper security; but, upon the defalcation occurring, no application was made to this Court by Lady H. De Blaquiere: she abdicated her claim to that protection to which she might have resorted; and, in like manner, General De Blaquiere, by leaving the alimony unpaid instead of seeking his remedy here in an application for a reduction of it, has made himself subject to her debts. On the other hand, there was a species of acquiescence, in

this diminution of alimony, on the part of Lady H. De Blaquiere, evidenced by her forbearing to resort to this Court, and by her allowing her husband to be sued for her debts. I am not, therefore, inclined to meddle with the arrears; for though General De Blaquiere was abroad from 1821 to 1827, and consequently the process of this Court could not be enforced against him, yet upon his return, no step was taken by Lady Harriet De Blaquiere to obtain payment of the arrears by the authority of this Court. It is clear, therefore, that Lady Harriet did not intend to call for the arrears; and if I were now to travel into that question, I should involve both parties in much intricacy of account. I shall not, therefore, decree for the arrears; and I come to this decision, principally upon the ground that no application was made to this Court either to enforce payment, or to obtain a reduction of alimony.

Where there is a material alteration of circumstances, a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased; and if the husband is lapsus facultatibus; the wife's allowance ought to be reduced. Applications of this sort are of rare occurrence; I only remember two instances where applications of either kind have been successful,—the case of *Foulkes and Foulkes*, for an increase, (Consistory, 1814. Hil. Term.); and of *Cox and Cox*, 3 Add. 276, for a reduction; (a) and I think that, under the present circumstances, Lord Stowell, if he had continued to occupy this chair, would not have made a different allotment from what he did when he originally fixed the rate of this alimony.

The principal point is, what is to be done in respect to Hill House Farm. There is an extraordinary affidavit from General De Blaquiere's housekeeper—whose husband manages the farm while she keeps the accounts, “that during the last fifteen years no profit has been derived from it;” but the point to be considered is, what the farm would let for. In 1820 it was estimated at 7000*l.*, Lord Stowell put the produce of it at a low rate, and I see no reason to depart from the view he then took of it. On the ground of the alteration in General De Blaquiere's income, I am not inclined to alter the allotment of alimony. Then, as to the mature age of the children: their growing years must have been taken into consideration at the time the alimony was originally fixed; and I see no ground on that account to alter the allotment, and diminish the comforts of the wife. There may, indeed, be cases where the Court would relieve the husband owing to heavy expenses arising from children; but I do not think this a case of that sort.

Again, has the income of the wife so improved as to call for a change? There are three items: First, the house at Brighton; but there is no proof by what tenure she holds it. It is true it was furnished at the ex-

(a) In *Wilson v. Wilson*, upon an application by the wife to enforce a monition for the payment of alimony, six years in arrear, the Court said:—“Unless the husband is absent from the country, or some particular reasons are set forth, it would be productive of great inconvenience and injustice, if, after a lapse of so many years, the Court should enforce such a monition. If the wife is aggrieved, she should make her application within a reasonable time, otherwise the Court will infer she has made some more beneficial arrangement. As a general rule, therefore, the Court is not inclined to enforce arrears of many years standing. Alimony is allotted for the maintenance of a wife from year to year. However, as there has, in this case, been no application to reduce the alimony, but the parties have gone on satisfied with some private arrangement of their own, I think I shall best consult the interests of both by decreasing alimony from one year prior to the monition,—the husband being allowed all payments on account of the wife during that year;—and, from the date of the present monition, I shall continue the alimony according to the original decree.”

pense of the husband ; for the tradesmen recovered from him the amount of their bills : but these sums have in fact been taken as part of her income, since the arrears are not enforced : the one must be set off against the other.

The second item—the sum of 140*l.* still due, is too trifling to cause any variation. The third item is, the apartments at Hampton Court, which are estimated at 100*l.* per annum, and it is sworn that Lady Harriet has them for her life : I doubt whether that can be accurate. I should think they were held at the will of the King : but even if otherwise, I should feel a great difficulty in stepping in to control, and interfere with, the munificence of the Sovereign. I will then, if called upon, enforce payment of alimony, at the rate settled by Lord Stowell, from the quarter day immediately preceding the commencement of these proceedings ; but I shall make no order, on one side or the other, as to any of the previous matters. The husband, will, of course, pay the costs of this application : for I cannot call that which is paid as alimony under a decree of the Court separate income of the wife.

On the 3d session of Easter term, upon an application, on the part of Lady Harriet De Blaquiére, to the Court for further directions as to the precise time from which the payment of alimony should commence,—the Court, referring to the date of General De Blaquiére's first affidavit, and the communication of it to Lady Harriet's proctor, directed that it should commence "from the quarter day next preceding the 16th of February, 1829."

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#### WILTSHIRE v. PRINCE, otherwise WILTSHIRE.—p. 332.

A marriage by banns—where, by the consent of both parties, one of the Christian names of the man (a minor) was omitted for the purpose of concealment,—is null and void under *st.* 4 Geo. 4. c. 76. ss. 7 and 22. *Quære*, if only one of the parties knew of the false publication.

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#### SHARPE and SANGSTER v. HANSARD.—p. 335.

Where no substantial inconvenience was shown by one individual, who opposed the faculty, and when the plan had been adopted at a vestry on the unanimous report of a committee, the Court will grant a faculty to level a churchyard and lay flat upright head and foot stones, with a clause that no expense shall fall on individuals.

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#### TURTON v. TURTON.—p. 338.

In a suit for separation for the husband's adultery with his wife's sister, proof that the wife, after knowledge of previous adultery, allowed under peculiar circumstances, this sister to accompany them to India and to live in the same house with them, will not bar the wife on the ground of connivance : her conduct, though imprudent, not being traced to a disregard of her own honour, nor to any motive necessarily criminal.

After publication, in a suit for separation for the husband's adultery, the Court will not, in the first instance, delay the hearing in order that the wife may counterplead her letters annexed to the husband's interrogatories, from which connivance, or a *par delictum* (neither pleaded), is to be inferred ; but seemle, that it will not ultimately allow her to be barred by reason of such letters without affording her an opportunity of explaining them.

In a suit for separation for the husband's adultery, the Court will not direct the husband to give security for costs, on a suggestion, unsupported by affidavit, that he was going abroad.

The Court will not, before the hearing, rescind the conclusion in order to admit an allegation counter-pleading letters annexed to interrogatories, nor will it direct such letters to be disannexed; but semble, that, if at the hearing, the letters appear important, it will then allow the admissibility of the allegation to be debated.

Where a criminal connexion is once shown, its continuance is presumed where the parties live under the same roof.

Condonation and Connivance are essentially different in their nature, though they may have the same legal consequence.

Condonation may be meritorious: Connivance necessarily involves criminality; and therefore the evidence to establish it should be the more grave and conclusive.

To found legal condonation as a bar to adultery, there must be a complete knowledge of all the adulterous connexion, and a condonation subsequent to such knowledge.

The Court, or the husband's Counsel, may take the objection of the wife's connivance when it clearly appears on the evidence adduced by her: but quære, whether such a defence can be set up on interrogatories alone; at all events, to support such a defence so set up, the conduct and evidence to prove it must be most unequivocal and incapable of explanation.

THIS suit was promoted by the wife against her husband, on the ground of adultery with her sister. The marriage took place in November, 1812: and the cohabitation ceased in February, 1824. The libel was admitted without opposition: it consisted of twelve articles.

Five witnesses were examined. A sister of the wife deposed, upon the 4th article,—“that late in October, 1821, she had reason to believe an improper, but not a criminal, attachment existed between her sister A., and Mr. Turton; that, as the elder sister, she interfered, and it was arranged that A. should not go into his house unaccompanied by some one of her family. Out of regard to the feelings of the family deponent kept it a secret. Early in January, 1822, while the wife and deponent were on a visit in the country, the wife opened a letter from A. to Turton; they both read it, and instantly ordered horses and returned home, when deponent had an interview with T., and it was agreed between them, with the concurrence of A., that all further intercourse should cease, and what had taken place be carefully concealed from the family, and that he should go to India. That early in February, deponent and A. went with their father to Bath, where they remained together till the 20th of July, when A. clandestinely went off. Deponent never saw T. or his wife from the time of her going to Bath, nor A. after she quitted it, previous to her proceeding to India.”

In answer to interrogatories,—it appeared—“that in April and in November, 1821, A. was at Brighton with Mrs. T. Respondent does not believe that T. was there at such times unless merely on a Sunday. After the unequivocal terms of the letter shown to her by Mrs. T. both T. and A. confessed, (in the wife's presence) that a guilty connexion had taken place between them. Mrs. T. in October, 1821, informed respondent that in that month she had intercepted a letter from her sister A. to T. which made her acquainted, that there was a warm attachment between A. and T. The elopement of A. from Bath was not discovered until nine at night; respondent and her father (who knew nothing of this criminal intercourse then, nor for years after,) got to Portsmouth the next morning; were there informed that Mr. and Mrs. T. were at Cowes, at which place they were to be taken on board; that, not believing this account, they travelled to a friend's house, but not finding them at it, they returned to Portsmouth on the next morning, where, unable to learn any tidings, they remained a few hours, and returned to

Bath." (a) She believes, that on or about 21st July, 1822, T., his wife, and A., went over to the Isle of Wight, and that Mrs. T. consented rather than that her father should be made acquainted with the misconduct of A.: and that had she not consented she would have been left behind by her husband. Mrs. T. arrived in England from India in July, 1824: she told respondent that her husband accompanied her upon her embarkation. Since her arrival she has received valuable presents from him. Respondent swears, that the conduct of Mrs. T., with reference to Mr. F. L. (a friend of T.) was such as was approved of by her and the rest of her family, that is, there was nothing to disapprove of. She never observed familiarities, or a habit of familiarity between them, which appeared to respondent unbecoming in Mrs. T. as a married woman."

A physician, after deposing,—that "in January, 1823, he was introduced to T., his wife, and A., upon their arrival in India:" went on, upon the 5th article,—"that in April, 1823, he was sent for on an emergency, in the night, to the house of T., where he delivered A. of a child: until the moment of his entering the room he was not informed of her pregnancy. Mrs. T. asked him 'what could be done to save appearances?' She was in great agitation: her husband came into the room: he concurred with her in urging secrecy: the child was conveyed out of the house within a few hours after its birth to be nursed. Deponent was left to his own suspicions as to who was the child's father."—Upon the 6th,—"that on A.'s recovery, he suggested to T. the expediency of sending her to England: he repeatedly urged it: he made the remonstrances in consequence of representations by Mrs. T. and of rumours prejudicial to T. Just before T. was taken ill, it was said Mrs. T. was to proceed to England in the Woodford; but, that, in consequence of his illness, the project was abandoned. She sailed for England in February or March, 1824."

7th and 8th. "A. continued to reside with T. till February, 1820, when deponent sailed for England. In January, 1825, he was called to attend her at T.'s residence; about two months previously he had been informed by T., that she was again with child, and that he would be wanted to attend her. Since deponent's arrival in England, he has seen A. and T. at the house of T.; there was one child with them which he believes to be the child born in January, 1825."

Upon interrogatories.—"The child born on 27th of April, 1823, lived about two months. Its birth appeared an unexpected event. The mother could not have been aware of such pregnancy on the 3d of August preceding. He had many conversations with Mrs. T.; she informed him that a criminal intercourse was carried on between T. and her sister: she never gave him to understand that A. was pregnant when she quitted England, or that Mrs. T. believed her sister so to have been. (b) T. never promised, in his hearing, that A. should return to

(a) In a letter written by Mrs. T. to a sister of her husband's from Andover (bearing the postmark July 22, 1822), were these passages:—"We are waiting here the arrival of my sister A.; she was suffering so much from my departure that I have consented to her wish of accompanying us, unknown to my father."—"I confess I do not feel quite happy about it, but I could not bear to leave her in misery."

(b) It was pleaded in the 4th article, that "while at Portsmouth about to embark, T. declared to his wife that A. was pregnant by him; . . . that on his knees he solemnly promised never to renew his criminal intercourse with her, and that she should return to England as soon as

England. After the recovery from his illness in August, 1823, T. his wife and A. went into the country together for about a month or six weeks. In November he had a relapse. His wife and her sister indiscriminately attended on and nursed him. Respondent repeatedly found A. alone with him when Mrs. T. was from home."

Two servants deposed—"That in the autumn and close of 1829 and early in 1830, A. was considered the mistress of the house in which she was living with T.: that they associated together at meals, but occupied separate bed-rooms; and that there were three children who called T. 'papa.'"

To the interrogatories several letters of the wife were annexed: those to her husband at the end of the year 1823, and two (after her arrival in England) dated respectively September 1824, and January 1825, were written in terms of extreme affection for him. They were, with others, introduced for the purpose of showing that she acquiesced in the arrangement for her sister to accompany her and T. to India; and that, while there, she resided with them; and further, that Mrs. T. had, in India, corresponded very familiarly with a young single man.

On publication of the evidence, the counsel for the wife applied to the Court for leave to bring in an allegation with certain exhibits—which formed the other part of the correspondence between her and her husband—in order to explain her letters to him (annexed to his interrogatories) and to remove any inference, prejudicial to her cause, that might be drawn from her letters.

*Phillimore and Dodson* for the wife.

No defensive plea has been given: but several of the interrogatories have been framed, and some of the letters introduced, with a view to convey insinuations against the wife; the circumstances suggested in these interrogatories, should have been pleaded, and the letters annexed, to have enabled the wife to counterplead and rebut them; they have been clandestinely imported into the suit: they are not exculpatory, but recriminatory. Our object is to meet the letters of the wife by letters in the husband's hand-writing. Pleading after publication is not frequent, but it is in the discretion of the Court: (*Webb v. Webb*, 1 Hagg. 349. [3 Eng. Eccl. Reps. 152.] *Middleton v. Middleton*, 2 Hagg. 134, Supplement. (4 Eng. Eccl. Rep. 299.) See also *Hamerton v. Hamerton*, supra, 1.) But the application stands so obviously on every principle of justice that it requires no authority in this instance to sustain it.

*The King's Advocate* and *Addams* contra.

The wife could not be ignorant of these letters. Some were written during cohabitation, others after she had left her husband in India: parol evidence is not admissible for the purpose of explanation. If, at the hearing of the cause, it should appear that any part of the letters relied upon are particularly stringent, and that the wife has had no opportunity of giving an explanation, then, according to the maxim "*causa nunquam concluditur contra judicem*," the Court may give her that power. In the cases cited, there were facts of adultery "*noviter perventa*." This is an application for permission to explain.

recovered from her expected delivery; and that he would never see her, except in her (his wife's) presence; that she being alone, without any friend to advise with, and most anxious to protect her family and herself from the scandal and disgrace necessarily incident to such an exposure, did, upon the faith of such promise, allow A. to accompany T. and herself to India."

*Per Curiam.*

I have had no previous intimation of this motion; but, as I feel no difficulty in disposing of it, it is not necessary for me to read the letters, nor make myself any further acquainted with the cause: the contents of the documents would not affect my present decision. These letters must, I apprehend, have been annexed to the interrogatories either to substantiate a charge of connivance in the wife, or as recriminatory. Now, I am not aware of a case in which, upon answers to interrogatories, the Court has decided either that connivance or recrimination has been proved so as to dismiss the suit of the wife: and on principle, I conceive, it would be difficult to arrive at such a decision. If, at the hearing of the cause, reliance be placed upon the letters annexed to the interrogatories, and I should be of opinion that the charge against the husband is proved, and that some explanation is required on the part of the wife, I should not do justice to her, unless I afforded her a full opportunity of making a defence. Something has been said, as if this explanation were a matter of strict necessity; but the Court must judge for itself, and I shall allow the cause to come on, in its present state, for argument; and unless it should then appear indispensably requisite to admit an explanation, I shall proceed to sentence, even though there be some minute matters which the wife might be anxious to explain.

*Phillimore.*—The absence of an explanation, we are apprehensive, may prejudice the wife in case she resorts to a higher tribunal, for a dissolution of her marriage.

*Per Curiam.*

I rely on the wisdom and justice of that superior tribunal to enable the wife, if necessary, to vindicate herself. I must confine myself to what is material for the administration of justice in this Court.

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The Court was then prayed—upon a suggestion, that Mr. Turton was about to return immediately to India,—to direct him to give security for costs and alimony.

*Per Curiam.*

I do not consider that the order in respect to a security for costs, entitles the wife, in a matrimonial suit, as a matter of course, to enforce the regulation: it applies *principally* to testamentary causes: but still may be introduced into cases of another description. The application, in this instance, is not supported by affidavit: I decline to make any order, and I conclude the cause.

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On a subsequent day an application was made to the Court, in Chambers, to rescind the conclusion of the cause for the purpose of receiving this allegation: the application was again refused; and, on the 30th of June, at the hearing of the cause, the counsel for Mrs. Turton having again applied to the Court either to allow the allegation and exhibits to be brought in, or to direct Mrs. Turton's letters to be disannexed from the interrogatories,—the Court observed:—"I am yet in doubt to what extent it is intended, on the part of the husband, to press the letters annexed to his interrogatories, and also the answers to those interrogatories which the wife is so desirous of noticing. It is then, I repeat, necessary for me first to ascertain what use is made of these documents and answers by the husband's counsel; and if, during the argument, they are insisted upon as a bar to the separation prayed by the wife,



and I should consider them important, I will allow the admissibility of the plea, now tendered, to be debated: but otherwise its contents will be immaterial."

The case was then argued upon the merits. The King's Advocate, with whom was Addams, admitted there was sufficient evidence of the adultery; but that the wife—having continued to cohabit with her husband, after she had full knowledge of his connexion with her sister, at least six months before she consented to her accompanying them to India,—was barred by her own conduct of legal relief.

*Per Curiam*.—Is there any instance of a bar on the ground of the wife's connivance, where no defensive plea has been given? Secondly, If connivance on the part of the wife be established, will that debar her from a decree of separation in a case of incestuous adultery?

The King's Advocate.—In *Walker v. Walker*, (a) there was no defensive plea, and the wife was held barred: that was the effect of great length of time; so far the circumstances are not similar; but the principle is there recognised, that the acquiescence of the wife, though not pleaded, yet if clearly proved in the cause, is sufficient. This is admitted in *Beeby v. Beeby*. (b) If the law does not permit a wife to acquiesce in the adultery of her husband, a fortiori, not in incestuous adultery. In *Denniss v. Denniss*, connivance at incest barred the husband. (c) 138.1  
H. 2

*Phillimore and Dodson* for the wife,—in reply.

The fourth article of the libel (d) has not been counterpleaded: it must, therefore, be taken pro confesso. The forgiveness was conditional. There is nothing to show that the criminal intercourse was renewed, while the wife was in India; nor, even if it could be inferred that it took place, that she was cognisant of it. No instance has occurred of the wife being barred by condonation, or connivance, merely suggested on interrogatory. *Durant v. Durant*: (e) and, in that case, the Court said,—“all authorities show, that condonation is not so readily presumed, as a bar, against the wife as against the husband. The injury is different: the forgiveness on the part of the wife is meritorious, while, on the part of the husband, it would be degrading and dishonourable.” *Walker v. Walker* was an extreme case; it furnishes an exception to the general rule. In *Beeby v. Beeby*, the Court held the wife's forbearance highly laudable, and condonation not established. The passages relied on were doubts dropped to guard against misrepresentation. The present case is so completely proved, that we are now satisfied with the evidence, as it stands, without an explanatory allegation.

(a) 2 Phill. 153. [1 Eng. Eccl. Rep. 220.] (b) 1 Hagg. 795.7. [3 Eng. Eccl. Rep. 338.]

(c) This was a suit for separation for the wife's adultery with the husband's brother. On the part of the wife an allegation—recriminatory and pleading connivance—had been admitted. At the final hearing of the cause, the Court refused a sentence of separation, on the ground of connivance, and thus concluded its judgment:—“Upon the evidence of this conduct, it is painful to pronounce that the husband is not entitled: he acted with imprudence in admitting such a brother: this was followed by the discovery of the adultery, which he severely felt; he repressed his feelings because he was under pecuniary obligations and suffered the intercourse to go on till the brother urged his demand,—this the law will not permit. The husband is charged with adultery with three persons,—into this it is unnecessary to inquire; for no alteration of the sentence would take place. I dismiss the suit.”

(d) See ante, p. 132, in notis.

(e) 1 Hagg. 733. [2 Eng. Eccl. Rep. 310.]—See also, upon the doctrine of Connivance, *Ro. gers v. Rogers*, (supra, 13,) and the several cases appended to it.

## JUDGMENT.

DR. LUSHINGTON.

This is a suit, brought by Mrs. Turton against her husband for a divorce, by reason of adultery alleged to have been committed by him with her own sister. The parties were married in November, 1812, and so far as can be collected from the peculiar circumstances of the case, the commencement of the intercourse between Mr. Turton and the sister of his wife was towards the end of the year 1821. The first question is, whether the charge of adultery is substantiated; and although the evidence perhaps has not been produced in quite so satisfactory a form as the Court could have desired, yet, looking to all the circumstances of the case,—to the difficulties which interposed to the completion of the proof in a better shape, and to the fact that Mr. Turton's counsel do not deny the guilt with which he is charged—I am satisfied that sufficient is proved to enable me to proceed to the consideration of the remaining parts of the case.

The cohabitation of Mr. Turton and the sister of his wife appears to have continued up to the commencement of the cause; for I take it to be clear that, according to the doctrine of this Court, and according to all the principles in similar cases, if it can be once shown that the parties had been cohabiting in an illicit connexion, it must be presumed, if they are still living under the same roof, that the criminal intercourse subsists, notwithstanding those, who live under the same roof, are not prepared to depose to that fact. The next point is, whether Mrs. Turton, who would thus be entitled to a separation from her husband, is barred by any misconduct of her own, or by any circumstances developed in the course of these proceedings. It must be manifest that if once the guilt of the husband be established, the onus probandi shifts; and if he seeks to deprive her of her remedy, by imputing a charge of criminality of any kind, he should make good that charge by evidence which admits of no dispute.

By way of defence to this suit, nothing has been set up in plea; but it is argued on behalf of Mr. Turton, from the answers to the interrogatories, and from certain letters attached to these interrogatories, that Mrs. Turton has so misconducted herself as to forfeit her claim to the remedy she prays. This branch of the case divides itself into two points: the first is, whether there has been any thing which can be termed condonation on the part of Mrs. Turton; and secondly, whether there has been connivance; for I apprehend these are essentially different in their nature, though either may have the same legal consequence. Condonation may take place, without imputing, either in the case of a wife or a husband, the slightest degree of blame, especially in the case of the wife, whose conduct might be more meritorious from her forgiveness of injury. But connivance necessarily involves criminality on the part of the individual who connives; and as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be the more grave and conclusive. As to condonation, it is impossible that any such defence can be maintained on this occasion; for I take the doctrine to be perfectly true, as laid down by the learned Dean of the Arches in the case of *Durant v. Durant*, 1 Haggard, p. 733, [3 English Ecclesiastical Reports, 310.] that in order to found a legal condonation, there must be a complete knowledge of all the adul-

terous connexion, and a condonation subsequent to it. Although it might be argued with a semblance of truth, that in 1822, even prior to the period when Mrs. Turton quitted England, she had pardoned the offence against her bed, yet there is not the slightest degree of evidence, or the least circumstance, to induce the Court to suppose that she ever intended to extend her condonation to the subsequent intercourse between the parties.

The attention of the Court must be confined, then, to this single point—has Mrs. Turton connived at the injury of which she now complains? Before I proceed further, I must repeat that no such averment has been given in plea. If I am called upon to decide, even in the present stage, on the charge of connivance sought to be established against Mrs. Turton, I should have to decide it on letters, which are annexed to interrogatories, and which consequently the wife has had no opportunity to explain (a). I am not aware of any previous instance in which a decision has been made on evidence thus *ex parte*. If I were of opinion that there was a *prima facie* case against Mrs. Turton, it is manifestly clear, that, according to all principles of justice, I should be bound to afford her an ample opportunity of explaining her conduct. There can be no rule of practice, in this or any other Court, so strict as to defeat the ends of justice; and I may with truth affirm, that this Court possesses in common with, and to the full extent of, other Courts, the power of adapting its rules of practice to the exigency of the case; and that it will never defeat justice by adhering to technical rules. Though, indeed, the Court, or the husband's counsel, might take the objection of connivance where it clearly appeared on the face of the evidence adduced by the wife herself, it is a serious question—whether it is competent to the husband to set up such a defence by interrogatory only, without giving the adverse party a full opportunity to answer: at all events, in such a case, the conduct, and the evidence to prove it, must be most unequivocal, and incapable of explanation. But it is not necessary for me to determine to what extent the answers to the interrogatories, and the letters ought to be admitted, or whether they ought to be excluded altogether; for, in the present instance, taking them as part of the case, I can, with satisfaction to my mind and conscience, arrive at a decision respecting which I entertain no doubt: for there is nothing in the letters which, in my apprehension, tends, in the slightest degree, to support the imputation of connivance upon the wife in the continuance of the intercourse between her husband and her sister.

It has been said, that after her suspicions had been awakened, Mrs. Turton allowed her sister to remain under her roof at Brighton, where Mr. Turton had the means of access to her. But so far as the proof goes, such opportunities, if they existed at all, must have been extremely rare, for Mr. Turton was at that time engaged in London, and only went there, occasionally, for a day: but as soon as she knew the connexion had taken place, Mrs. Turton, through the medium of her eldest sister, contrived an arrangement, whereby the object of Mr. Turton's attachment was removed.

Unquestionably at that period there was a condonation of the hus-

(a) According to the practice of the Ecclesiastical Courts, documents, annexed to the interrogatories, cannot be known to the other party to have been so annexed, till publication of the evidence has passed; and when, without special leave, no further plea, unless exceptive, can be admitted.

band's offence. It is perfectly clear that during the year 1822, and for a subsequent time, Mrs. Turton made up her mind to forgive, and to cohabit with her husband, as if no such calamitous disgrace had occurred; and if the connexion had not been renewed, however disgusting that connexion was, there would remain no question, that, by admitting her husband to her bed, the condonation was complete (a).

In 1822, it would seem, in consequence of this unfortunate intercourse, Mr. Turton determined to quit England and go to India. It would appear, that when Mr. Turton and his wife were on their way to the sea-coast, preparatory to embarking for Calcutta, the sister joined them, and, with the acquiescence of Mrs. Turton, sailed with them to India. Now, reviewing this transaction at the present period, it is impossible not to entertain more than a doubt as to the propriety of Mrs. Turton's conduct. I may feel it to be strange, that when the insult was thus renewed, she did not resent the conduct of her husband, and at once separate herself from him. But I must consider the peculiar situation in which Mrs. Turton was placed. This was no ordinary case; the circumstance is not one of frequent occurrence. If, refusing to accede to the request of her husband, she had determined upon instant separation and public exposure, she knew the consequences—which must have had some influence upon a feeling mind and affectionate heart—the exposure of her own family, and the degradation of her own sister. Alone, without the benefit of advice and assistance, if not under the control, at least under the superintendence, and within the influence of her husband, and with every consideration to induce her to wish for concealment and prevent disgrace, I must not judge her conduct, on this occasion, with too much severity; and I am not prepared to conclude, that, in allowing her sister to accompany them to India, and there to remain for the purpose of concealment, Mrs. Turton has forfeited her claim to the remedy which she now seeks. It must be recollected, that Mrs. Turton has expressly averred, (b) that, at this period, Mr. Turton represented her sister to be pregnant, and strongly urged that circumstance as a ground for her leaving this country, and sailing with them to India, promising that when the child should have been born and the desired secrecy attained, she should be sent back to England.

After arriving in India, there seems to have been a rather long space of time before Mrs. Turton returned to England; but this delay is chiefly explained by the dangerous illness of Mr. Turton, and by other circumstances (c). At all events, there is nothing to satisfy my mind that she became reconciled in the slightest degree to the continuance of the intercourse between her husband and sister: and, I am of opinion, therefore, that she is not guilty of connivance. These facts appear then to me to comprehend the whole of the case.

I have read the letters with care and attention; but I can see no reason to detail their contents at any length, nor to doubt as to the judgment

(a) In *Denniss v. Denniss*, (supra, p. 135) the Court said,—that though the wife was entitled to her dismissal on the ground of the husband's connivance at her incest with her brother, it did not necessarily follow, that, in a suit for restitution of conjugal rites, the Court would compel the husband to return to an incestuous bed.

(b) See ante, p. 132, in notis.

(c) The cabin, on board the Woodford, which Mrs. Turton had secured for her voyage to this country, and had afterwards relinquished upon the serious illness of her husband, was, at his recovery, engaged to another party; and Mrs. Turton had no subsequent opportunity of sailing that season for England.

which it is my duty to pronounce. Mrs. Turton was placed in a situation of painful difficulty; and if I am of opinion, that throughout the whole of this calamitous case, she has not adopted that line of conduct which prudence might consider best, yet I am unable to trace it to any disregard of her own honour, or ascribe it to any motive necessarily criminal. I think she is entitled to the remedy she prays; and I feel it the more especially in a case of this peculiar description, where the parties are so nearly connected in blood, and where the offence has been committed against the wife. All reasons unite to convince me that the justice of the case requires that the wife should be removed entirely from the control of a husband, who has so repeatedly sinned and offended against her. I pronounce for the separation.

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The Office of the Judge Promoted by JARMAN v. BAGSTER.—  
p. 356.

On debating the admissibility of Articles in a suit for Brawling, the question is, whether they contain a substantive charge of brawling and riot in a sacred place: and no occasion nor provocation can exempt from the penalties of the law; nor can the Court listen to a suggestion, that the articles do not truly detail the circumstances.

Articles for brawling, at a vestry held at a room within the church, being only proved in part, the Court monished the defendant to abstain from future misconduct, and condemned him in 20*l.* nomine expensarum.

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The Office of the Judge Promoted by JARMAN v. WISE.—p. 360.

On proof of violent conduct, and great personal abuse, at a vestry held in a room within the church, the Court suspended the defendant ab ingressu ecclesie for fourteen days; but, under the circumstances, condemned him only in 35*l.* nomine expensarum.

In criminal suits the Court will sometimes inquire into the motives of the promoter, but it will presume proper motives unless there be strong proof to the contrary.

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## IN THE HIGH COURT OF DELEGATES.

FLETCHER v. LE BRETON.—p. 365.

On an appeal from a definitive sentence, the Court rejected an allegation pleading facts not shown to be noviter ad notitiam perventa.

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SCALES v. HOILE.—p. 371.

(Office of the Judge promoted.)

In a criminal suit for smiting under 5 and 6 Edw. VI. c. 4, the proof must not admit of a doubt. Two concurrent sentences, pronouncing the smiting proved, reversed, and both parties left to pay their own costs.

## STANLEY v. BERNES.—p. 373.

4. 407.

4. 479, 80.

*On Appeal from the Prerogative Court of Canterbury.*

A natural born British subject may acquire a foreign domicile; nor will the animus revertendi, and claim to be considered, and treatment as a British subject, preserve his original domicile—and, if domiciled abroad, he must conform in his testamentary acts to the formalities required by the *lex domicilii*.

The will and first two codicils of a British born subject, resident and naturalized in the Portuguese dominions, (the will disposing of effects partly in Portugal, and partly in England,) executed and purporting to be executed according to the laws of Portugal, but inferring that he considered himself an Englishman, admitted to probate; but two later codicils—fully proved as to capacity and intention, disposing solely of money in the British funds, attested by three witnesses, but not executed, nor purporting to be executed, according to the law of Portugal—refused probate by the Delegates, reversing a sentence of the Prerogative.

THE deceased, John Stanley, died at Madeira on the 15th of November, 1826, being upwards of eighty years old; Helena Stanley, his widow, since dead, and John Stanley, the party in this cause, his only child, were the only persons entitled, in distribution, if he had died intestate. The deceased also left a natural son Joze Maria Bernes (the other party in the cause), who was married and had five children, and was with his children largely benefited under the testamentary papers propounded.

The material parts of the testamentary papers were as follows:—

"In the name of God, Amen.—I, John Stanley, born in Ireland, &c. do determine, as my last will and testament, as follows:—Having been brought up in the religion of the Established Church of England, I intend to die in that religion, and request that my burial may be in the English burying ground. Having a natural son named Joze Maria Bernes, now one of my family, he living in the same house with me, whose mother, of Pernes in Portugal, died when he was but two years old, and was reared by Roza Maria Joaquina, also now of my family, who, having a niece, I caused her, being reared and educated from a tender age, and that my said natural son should marry her, she having a deal of merit, which in fact he did, and they have now five children. I hereby do acknowledge the said Bernes to be my son, and that his said children are my grand-children, and that they shall be always considered as such, as also any farther children they the aforesaid may have, for inheriting the property of mine, I bequeath them, or may hereafter bequeath them, or as my grand-children they may come entitled to. That in this consequence I bequeath to my eldest grand-son, Joze Joaquim Bernes, 1000*l.* sterling money of Great Britain for himself and his heirs, and to the other four my grand-children 2400*l.* sterling money of Great Britain, being 600*l.* for each, for themselves and their heirs, with condition, that should they or any of them die minors or unmarried, such part or parts to devolve to the succeeding, my grand-children of said Joze Maria Bernes, and in failure to them living; should the eldest son, Joze Joaquim Bernes, die a minor, and unmarried, the legacy for him is to devolve to the other children aforesaid, and in failure of all the children, then these legacies are to devolve to the father and his heirs. That being under immense obligations to the aunt of said children, say, their mother, Joaquina, for rearing and promoting the education of my said natural son, she also aiding the rearing of my son John Stanley, junior, and being also indebt-

ed for her very great care of my health, to which end she left her country, and came hither with me to take care of me in my old age, serving also as company, these are services deserving the most grateful returns; and considering that the house I gave her in Lisbon for her services there does not produce sufficient for her support, I bequeath her 1000*l.* sterling money of Great Britain, understood, the interest arising only during her life-time, and that she continues unmarried, for in such case of marriage, or she dying, this capital and interest is to devolve to the children of said J. M. Bernes, divided between them, and in failure to him and his heirs. Some transactions with my said natural son, I hereby declare are settled, and that he owes me nothing, and do hereby prohibit and forbid my son Stanley, jun., from investigating any thing relative to said transactions, nor what may concern Joaquina, neither to inquire for any money of any description there may be in the house, which cannot be much, having disposed and invested the same already in bills I sent to England. That know my son J. Stanley, jun., the only child I have surviving of my children in matrimony, I say that know he has very good principles, and will not oppose anything determined by me in my present last will and testament, so as to affect his own character and my memory; moreover, he must have a handsome property of his own, as is learned from existing circumstances regarding him, which have become acquainted with, so as the legacies I bequeath, or may bequeath hereafter, he can well afford. However, as I wish to provide and protect my poor family here from ties of blood and gratitude, should it unfortunately happen from being led astray, and investigated by connections inimical to my family, he has formed, or may form, in such case, as a fine, I bequeath to my said natural son, for use and benefit of his children, and to be considered their property, and this to be considered an additional legacy for them. The legacy aforesaid, as a fine, is 3000*l.* sterling money. That from the veracity my son J. Stanley, jun., possesses, he will not deny that a writing I signed in his favour in Lisbon many years ago, making over to him a large part of my property, was purely, and only fictitious, as a kind of a temporary provisional measure, by reason of the French at the time menacing to invade Portugal, conceiving, as being born in Portugal, that it may be more respected under his my said son's name; moreover, I acquired after a great deal more property now under my name, and solely mine, and this, independent of the large share of even more than half my property, I gave him, by putting it under his name when I intended retiring from Lisbon, which part or half of my property put into his hands is to be understood and considered, and also was his mother's share of the same, according to the laws of Portugal, though no writing was made between she and me to that effect. She laboured for many years, and does yet, under a disorder of mental derangement, causing her going to Ireland, where she still remains, and a yearly income established for her support, which my said son was to provide, by my retiring out of a part I gave of my property. I had a partnership with my said son several years ago, wherein, for the advantage or profits arising to him, he has been fully and amply compensated. The income for his said mother little exceeded the interest, say, a tenth part of the interest of the property belonging to me, which I gave him as aforesaid, as the state she was and is in rendered more useless, wherefore all that property becomes his. I repeat again, that am not afraid of the want of candour, veracity, and honour of my said son J. Stanley,

jun., as he possesses a great deal : it is only his connexions I fear, that he may be instigated by such, so as to forget the duty and respect due to my memory, and offend his own character, in which case only the aforesaid fine is established, of 3000*l.* sterling money of Great Britain, and to be applied for a legacy of that sum, I hereby bequeath to my natural son, for use and benefit of his children, as an indemnification for the great vexation such an unjustifiable proceeding may occasion." [He then gives certain powers to his executors as to 2056*l.* 11*s.* 1*d.* navy 5 per cents., bought for him, and in his name, by Messrs. Campbell, of London : and also 1200*l.* sterling, invested for him, and in his name, by Messrs. Whitmore, of London.] " I hereby provide and determine, that should I outlive my son J. Stanley, jun., I give to Joaquina, 1000*l.* sterling, independent, and so much more than the legacy I have already bequeathed her, and to be for herself and her heirs. To my natural son, for use and benefit of his children, three-fourths of my said property, and to devolve, in failure of them, to himself and his heirs. To my brother, William, for himself during his life only, and to devolve to the legitimate children he may have in matrimony, the remaining one-fourth part of my said property ; but in case of failure, or by his death, to devolve to my natural son, for use and benefit of his children, and in case of failure of them to himself and his heirs. The residue of my property, which was acquired by my industry, and therefore solely mine at my disposal, and after payment of the legacies by this my last will and testament given, as also any farther and future ones I may give, I hereby give and bequeath to my son J. Stanley, jun., whom I name as my heir for such residue, or heir to the residue of my said property, under condition for his attending to the dispositions on my part made in my present will, and that they are complied with on his part ; said residue consists in money I have in the English funds, the three per cent. consols, five per cent. navy annuities, and four per cent. annuities, also different sums of money in hands of correspondents abroad ; also some here, in hands of Messrs. Gould and Co. ; money I have under my said son's name, in the funds of the United States, and houses in Lisbon in my own name. All my furniture of my house, linen, and plate, I hereby give and bequeath to my natural son J. and R. M. Joaquina, a half for each, and to devolve to their heirs for their use and benefit. I farther give to my natural son, and R. M. Joaquina, for themselves and my family, the use of the house I reside in, up to the end of the leases to July, 1824, as also for any farther time I may rent the house for, I hereby declaring that they the aforesaid and my family are my true and only representatives. That considering the sum of 2400*l.* sterling I have bequeathed for use and benefit of four of the children, my grand-children, of J. M. Bernes, is not sufficient, I hereby bequeath them 600*l.* more, sterling money of Great Britain, thereby making the sum of 3000*l.* sterling money, to devolve in case of failure of any of them, to the other children, my grand-children, of him, J. M. Bernes, as already determined and established in my present will. I hereby name my successor, my son J. Stanley, jun., for the second life, for having and receiving the yearly pension or pencao of two hundred milreis per ann. in the Royal Erázio in Lisbon, which his Majesty was so gracious to grant me ; and I hereby name and empower my said son to have the arrears that may be due to me ; in failure of my said son before my decease, I nominate my natural son, J. M. or his eldest son, as my successor for said second life, to have said pension



and the arrears." [Executors, W. N. Roope, Webster Gordon. (W. Cossart, J. Anglin, substituted). Funchal, 21st of June, 1820.]

(Signed)

JOHN STANLEY."

"CODICIL to my last will, dated 21st of June, 1820.—I hereby confirm my last will in every particular, and add, that considering I have not left a sufficiency to the children of my natural son J. M. Bernes, I, by this my last will and testament, bequeath to them 2000*l.* sterling money of G. B. more, making, in the whole, the sum of 5000*l.* sterling money aforesaid, for their use and benefit, to devolve, by decease of any of them, to the others living, and in case of their failure, to devolve to the father, my natural son, for himself and his heirs. My executors will be so good as to place this sum at interest in England, or invest it in the public funds there, as they shall think it most expedient, and to go on accumulating until the children come of age, and then to be at their disposal. Should my executors judge it a-propos to make the investment in a part of the funds I have in my name in said public funds in England, I hereby empower them, in the most legal manner, so to do, and in same manner to cause transfers from my name in the Bank of England, to the name of the father Joze Maria Bernes, should he be living, and in failure, to the trustee, a safe one, that he may nominate, or be named, if necessary, by my said executors, as it is to them I look for protecting the children: the trustee appointed, to sign a deed of trust, even the father, that said investment in his name is solely for use and belonging to the said children, and the dividends arising to go on accumulating as aforesaid, for benefit of them the children." [James Gordon to be an additional executor.] Funchal, 4th July, 1820.

(Signed)

JOHN STANLEY."

"SECOND CODICIL to my last will and testament.—Reflecting I have not made a separate consideration for my natural son, as a token of my regard, as also that he is unhealthy, so as to require an aid for himself and his family ere many years passes over, I hereby, by my last will and testament, give and bequeath to him the sum of 2000*l.* sterling money of G. B. for himself and his heirs. As half the revenue of the house in Lisbon I give to R. M. Joaquina during her lifetime, devolves to my son J. Stanley, jun., by her decease, and but the other half devolving to J. M. Bernes, and only during his life, when wish the whole should be for himself and his heirs, whereas it returns and becomes the property of my heirs; I therefore, as an indemnification, bequeath to him, my natural son, 800*l.* sterling money, for himself and his heirs. Should it unhappily happen that my son J. Stanley, jun., from instigation (otherwise he will not) wish or attempt to cause my last will and testament to become subject to the laws of Portugal, so as for not being able to dispose of more than a third part of my property, I therefore hereby declare, that the different legacies I have bequeathed by my said last will, and codicils thereto, are all of them from said third part of my property, a *minha terça*, in the Portuguese language; as a penalty for my said son so attempting, I give the surplus arising of my third part of my property, a *minha terça*, to him my said natural son J. M. Bernes, and R. M. Joaquina, a half for each; but this is not to take place if my son J. causes no such measure either from himself, or indirectly by means of any other person. Under the like penalty my son becomes liable for any investigations he may be instigated to make, from suppositions that I gave sums in bills of exchange or moneys for

purposes, to J. M. Bernes and R. M. Joaquina, as I deny such being given, on the contrary, that they were loans, and such sums only lent, the payments of which I hereby forgive them the parties, and such payments are legacies I by this my last will and testament bequeath to them, for themselves and their heirs, out of third part of my property aforesaid. As the property I gave to my son John Stanley, jun., and the part by me under his name was only verbally given, and not by any irrevocable agreement in writing, and as it is but formally and legally given by my will, it consequently becomes a part for adding to the other part of my property for forming a total, and thereof a third part at my disposal, according to the laws of Portugal. (a) As my son is in affluence, according to certain informations I have received, he by no means wants my aid, as does my natural son, and Joaquina, independent of the immense obligations I am under to her, therefore I beseech and beg leave recommending most particularly to the protection of my executors, as such may be very necessary, from the motives already alleged. Funchal, 11th July, 1820.

“(Signed)

JOHN STANLEY.”

The THIRD CODICIL, dated Funchal, 24th, and the addition to it, dated 31st October, 1822, were only to alter the executors.

“A FOURTH CODICIL, made this day, to my last will and testament. Finding I have not made sufficient provisions for my grandchildren, now increased in number, I hereby confirm the provisions I already made, which are to be considered as making a part of my said last will and testament, which provisions, by donations on my part from me, are in trust with James Campbell, Esq., of London, namely, one for a limited sum, a considerable time back, to two of the children, as per trust-deed he passed, and two other donations, given by me in July last, say, one of 1000*l.* sterling to Joseph J. B. and John M. B., a half for each; the other donation I hereby bequeath to Joseph J. B., of 1200*l.* stock (twelve hundred pounds sterling) I have in the 4 per cents Annuities, latterly reduced to 3½ per cent. Dividends receiving by Messrs James Campbell and Co. to whom have advised, for being transferred to and under the name of James Campbell, Esq., in trust for him Joseph J. B. until he comes of age, for being transferred to and under his name, mean time the dividends arising and receiving are for his use and benefit; and in case of his decease, to devolve and pass to the other children, as determined in my letter of advice to that effect, and the respective trust-deed preparing by the aforementioned esteemed friend, which is to be considered valid and had, as if declared herein in this my last will and testament. Finding I have not made such provision as intended and promised to my said grandson Joseph J. B., my favorite, the eldest son, I hereby bequeath to him 2159*l.* 7*s.* 7*d.* stock, part of 4259*l.* 7*s.* 7*d.* stock I have in the new 4 per cents, hereby revoking any power my son J. Stanley, jun., may claim from my will, for having and transferring that part of the said stock to and for himself, and said power is exclusively vested in them, as also for entire of that sum of 4259*l.* 7*s.* 7*d.* stock I have in the new 4 per cents; it is to be understood, that the aforementioned power of transfer is exclusively vested in my executors,

(a) The Portuguese lawyers stated; that if a testator in his lifetime make advances to any of his children, such advances must be brought into a calculation of his effects after his death, so as to increase the proportion of which he has a right to dispose. One or two limited the application of this rule to questions arising between children having a right to the inheritance.

should I not in my lifetime make the transfer or sale. In case Joseph J. B. should die, one-half of the sum of the 2150*l.* 7*s.* 7*d.* stock I now bequeath him is to pass to John M. B., and the other half to Joaquim M. B., Antonio J. B., Vincente F. B., and Maria J. B., divided in equal parts between them: and should any of them die, his part is to pass to the surviving ones, divided between them, and should they die, then to devolve and pass to the children born after. Considering that to the three last mentioned children no certain provision is made by me, being but casual, to John M. B. being but small, and to Joseph J. B. not so much as I wished, I hereby, by my last will and testament, bequeath to them of the 2100*l.* stock aforesaid in the new 4 per cents, in manner following; 525*l.* to Joseph J. B.; 700*l.* to John M. B., and in case of death of his brother Joseph, his part to pass to him John M. B.; the remaining 875*l.* I bequeath to Antonio, Vincente, and Maria, divided in equal parts between them; and in case of one dying to pass to the other two, and should two of them die, one part to the survivor and the other part to the next born, and in case of death to the other or others following: and should John die, his part or parts to devolve and pass to the three latter children mentioned, and in default, to the next born, divided in equal parts between them. In case I did not mention, in my general will, the sum bequeathed to and for the children to be invested in the funds in England, and continue until they come of age, I hereby beg the favour of my executors to cause such to be done, and their respective parts to be delivered to them when they come of age. Funchal, 29th October, 1825.

" (Signed)

JOHN STANLEY."

" This codicil is in my hand-writing, being wrote by me.

" (Signed)

J. STANLEY."

" Witnesses, (Signed)

*William Bellringer, Merchant.*

*Jno. Blandy, Do.*

*A. H. Renton, M. D. (a)*

" I hereby revoke the words " donations " I made use of in my present codicil, as meant them advances or loans, which hereby I forgive and are forgiven by me, they the said advances or loans being constituted by this codicil legacies, and are to be had as such. Date as before.

" (Signed)

JOHN STANLEY."

" Done on recollection, after signing the witnesses."

The allegation, in support of the papers, pleaded generally,—that the whole of these papers were in the deceased's hand-writing, and signed by him. The will and first two codicils the deceased declared, in the presence of a notary and five witnesses, to be his solemn will and testament, and desired they might be considered as good, firm, and valid; and requested the notary to draw up an act thereon, which, being done, the deceased approved and signed such act; the notary attested it, and the five witnesses subscribed their names thereto. That the third codicil, the addition thereto, and the fourth codicil, were each published and declared as codicils in the presence of three witnesses, who attested them. The addition to the fourth codicil was not attested. That deceased was at all times of sound mind. That he died at Madeira, and being a British

(a) The third codicil, and also the addition to it, were attested in the same manner by three witnesses.

subject his will and codicils were soon after his death deposited at the British Consul's office, wherein the testamentary dispositions of British subjects, resident at Madeira, are usually deposited. That the will, &c. remained there: and that paper A was a true and authentic copy of such papers.

On this allegation fourteen witnesses were examined: two at Lisbon, eleven at Madeira, and one in London.

The opposing allegation pleaded,—that the deceased was a native of Ireland, which he left prior to 1770 and settled at Lisbon, where, and at Madeira—an island within the dominions and subject to the laws of Portugal,—he resided uninterruptedly till death. That in January, 1770, the deceased, then at Lisbon, abjured by a public act of renunciation the Protestant religion, and professed that of the Roman Catholic Church, and afterwards, in the same month married Helena Doran, of Irish extraction, a natural born Portuguese subject, his widow, without any marriage articles, and had by her Stanley, the party in the cause, his only surviving child, born at Lisbon, in December, 1777. In 1798, the deceased, desirous of perpetuating his residence in the kingdom as a Portuguese subject, obtained an act of naturalization; and on the 6th of March, 1801, in virtue of permission duly granted on the 26th of February, 1801, signed a bond of allegiance whereby the act of naturalization came into operation, so that, from such signature, he became ipso facto naturalized in Portugal, entitled to all the privileges and liable to all the obligations of natural born subjects of Portugal. That during the occupation of Portugal by the French in 1808, on production of such act of naturalization, he was treated as a native Portuguese subject, and his property, as that of a natural born subject of Portugal. That in 1823, the deceased, then at Madeira, authorized his son to take, and he accordingly took, on his father's behalf, an oath of observance of the constitution under the Portuguese monarchy; *that the deceased having so renounced his own country and become permanently resident and naturalized in the kingdom of Portugal, thereby became and thenceforward was in all respects subject to the laws, &c. of Portugal. That in the absence of a will valid by the laws, &c. of Portugal, his effects, wheresoever situated, should be disposed of as if he had died intestate.* That by the laws, &c. of Portugal any Portuguese subject, leaving a widow not endowed by her marriage articles, and issue, cannot dispose by will of more than one-sixth of his whole property, the widow necessarily taking a moiety (of two-thirds of which moiety the issue is necessary heir at her decease), and the issue two-thirds of the other moiety, or the whole of the moiety if the father does not dispose by will of his third thereof: that any will of a Portuguese subject (leaving a widow and issue) contrary to such laws &c. is null, and such subject is deemed to have died intestate. That the will and first two codicils in this case, though apparently made with all the legal formalities and executed according to the laws of Portugal, are in their whole substance repugnant to such laws, &c., inasmuch as he gives considerable legacies to a natural son, (a spurious and adulterine offspring not legitimated by royal authority,) and to others without taking account of the widow's moiety, or constituting his son heir of two-thirds of the other moiety, and confining himself to legacies not exceeding one-sixth of his whole estate, as he was bound to do by the laws, &c. of Portugal. That the latter two codicils are in the same manner

repugnant to the Portuguese laws, &c., and are not executed according to the forms prescribed by that law.

In supply of proof, were annexed No. 1, a copy of the act of abjuration of the Protestant religion, by the deceased at Lisbon, in 1770; No. 2, a copy of the act of naturalization in 1798 (*a*); No. 3, a certificate of the record of the execution of the act or bond of allegiance (*b*); No. 4, a copy of the recognition of the deceased, by the commander of the French forces at Lisbon in 1808, as a native Portuguese subject, releasing his property from the sequestration made by the French of English property in Portugal at that time; No. 5, a copy of the power granted by the deceased to his son, John Stanley to appear for him, and take and subscribe the oath of observance to the constitution of the Portuguese monarchy in the year 1823 (*c*); and of a certificate that John Stanley, did, in 1823, in virtue of the said power, and as the representative of his father, take such oath.—Thirteen witnesses were examined at Lisbon on this allegation.

The allegation in reply pleaded;—that the testator was a native-born subject of the King, and from his birth resided in Ireland, until he went to Portugal, to transact certain commercial affairs. That on signing the bond, the deceased did not become naturalized in the kingdom of Portugal; for that by the laws of Portugal all grants or privileges granted by letters patent, or otherwise, are obliged to pass through the Chancery Court within four months from the time of the granting, and that otherwise the letters patent or decrees are absolutely null and void; that the act of naturalization was never passed through the Court of Chancery, and therefore was altogether invalid. That the French did not treat the deceased as a Portuguese subject, but as a British subject, and caused him to be imprisoned, and his property sequestered on that ground alone, until by the payment of a considerable sum of money he obtained the liberation of his person and the release of his property; and thereupon, and for no other reason, procured the recognition of his naturalization. That John Stanley (party in this cause) did not, in 1823, in the name of the deceased, take the oath to the Portuguese constitution, in consequence

(*a*) The material part of this act was, in substance, as follows:—"Dona Maria, &c.—We make known, that John Stanley, a native of Ireland, having put himself under our immediate protection, and given satisfactory proof of his being established in this kingdom, with an intention of residing therein for life, as our subject, we naturalize him in these kingdoms, so that he may be entitled to all franchises, dignities, and privileges, enjoyed by the natives of these realms, it being understood, that before he can have the benefit of this mandate, he shall first subscribe a bond, in virtue of which he shall be inscribed amongst, and as one of our subjects, so that he may enjoy the said rights and privileges to which, in that quality, he shall become entitled."—Lisbon, 2d of July, 1798.

(*b*) The certificate was to this effect:—On the 6th of March, 1801, upon a dispatch of the 26th of February, 1801, an act and bond of allegiance was subscribed by John Stanley, a native of Ireland, upon the conditions of renouncing all the rights and privileges of his nation, subjecting himself to the laws, &c., of these kingdoms, and to the observance and payment of the several obligations, duties, and imposts, to which native subjects are liable, as if he were a native, not to absent himself from this kingdom without licence from her majesty, the whole, upon the pains established by the laws of Portugal, he hereby binding himself voluntarily to the above conditions, and promising to conduct himself as a true subject of this kingdom, otherwise to incur the penalties attached to delinquents in such cases, and particularly to the forfeiture of his property, in case he should at any time claim or avail himself of the rights and privileges of the nation which he doth renounce."

(*c*) "I give full authority to my son, for me and in my name, to declare upon oath, that I promise to uphold and observe the political constitutions of the Portuguese monarchy, as decreed by the extraordinary general Cortes of that nation, my said son having my authority to subscribe the act witnessing my said promise, upon oath.—Madaira, 3d of January, 1823.

"(Signed)

JOHN STANLEY."

of the deceased being a Portuguese subject, for that no oath was at such time required from a Portuguese subject, as such; that in 1823 the deceased received a pension from the Portuguese Government, as a reward for having, as an English Merchant, obtained a loan for the Portuguese Government, and that by the then law of Portugal all persons who received pensions were obliged to take an oath to the constitution. *That the deceased being a British-born subject, any will made by him in conformity to the laws of England, is good and valid as to the disposition of the whole of his property wherever situated*; that a will made by a Portuguese subject, leaving a widow not endowed, and child, and being contrary to the laws, customs, and usages of Portugal, is not null and void, but is, by the law of Portugal, void only as to the disposition exceeding one-sixth of the whole property. That the deceased professed the Protestant religion, until his death, but that being desirous of marrying a Portuguese Roman Catholic subject, and it being contrary to the laws of Portugal for a Portuguese Roman Catholic subject to marry a Protestant, he, to enable him to marry, and for no other purpose, submitted to a form of renunciation of Protestantism, and made an open profession of the Roman Catholic religion, but did not comply with the orders, or attend to the religious services of that church, but always conformed to the Protestant worship. That the deceased as well previously as subsequently to his will, declared he was a Protestant, and that he wished to die in the Protestant faith, and, at Madeira, he frequently, and until within a short period of death, declared, that if prevented from returning to England, he wished to be buried in the English burial ground in Madeira. That whilst at Lisbon, and in Madeira, he always intended to return, and permanently reside in his native country, and frequently declared his intention so to do: that on several occasions he actually took steps for, but by unforeseen occurrences was prevented from executing, such intention, though he never abandoned it.

On this allegation twenty-seven witnesses were examined; nine at Lisbon, seventeen at Madeira, and one in London.

It was proved that the deceased was a native of Ireland, that he went to Lisbon prior to 1770: that in 1809 he went to Madeira, and from the time he first left Ireland he was resident in the Portuguese dominions: that his wife, though of Irish extraction, was a native Portuguese subject and a Catholic: that the deceased, in 1770, abjured the Protestant religion. That his legitimate and illegitimate children and grand-children were all brought up as Catholics, and that all the inmates of his house were Catholics; that he did once at Lisbon receive the sacrament as a Catholic. That, in 1801, the deceased signed the bond of allegiance: in 1823, made a declaration of adherence to the Portuguese constitution, which was required to be taken by all Portuguese subjects who held office or received pensions (a). That he had houses at Lisbon and money invested in the American and other funds, as well as in the English. That though the deceased, on account of his name, was at first, in 1808, thrown into prison and his property sequestered by the French, yet both he and his property were afterwards released; but, except Exhibit No. 4, there was no direct evidence on what ground he was released.

*On the other hand*;—That the deceased abjured his religion only in

(a) The deceased did receive a pension.

order to marry, since a Portuguese Roman Catholic subject and a Protestant could not intermarry (some of the lawyers said, not even with a dispensation). That he did not at Madeira conform to the worship and ceremonies of the Church of England; that he was not treated by the Catholic curate of his parish as a Catholic; that though not of strong religious feelings he did occasionally, though rarely, attend service at the English church; and in his last illness sent for the English Protestant clergyman. That he frequently declared himself a Protestant, and expressed abhorrence of Catholicism. It was further proved that he described himself as a British subject, that he often expressed his earnest wish and intention "to return to end his days in Ireland," or "to lay down his bones in his native country." That once, about 1822, being requested to wait a little for his rent he said "he could not, because he was preparing to leave the island and go to his native country." he would say, "God forbid I should die or be buried here." Latterly he used to say, "he feared from his infirmities he should not be able to accomplish his return; and, about a year before his death, on passing the English Protestant chapel and burying-ground at Funchal, he said, "he feared, notwithstanding all his hopes and intentions of returning home, that place would receive his bones." That on his death he was there buried, and his will taken possession of by the British consul, as was usual with the wills of the subjects of England. That he invested his money principally in the British funds, and when his wife became deranged, he sent her over to Ireland and made her an allowance there. That in expectation of the French invasion he had, as a precautionary measure, transferred his property into the name of his son, who was born in Portugal (a).

(a) The prominent points of evidence, as to the deceased's religion and national character, on both sides are set forth in the following parts of the depositions.

Henry Veitch, Esq. (examined in London) deposed.

"That the deceased was a British subject was never doubted or disputed by the Portuguese authorities; deceased resided in that island as a British subject, claimed to be so considered, and was so considered, from first to last; upon his death, deponent, as British Consul, attended at deceased's house, and having found the will and codicils, carried them to the British Judge Conservator, in whose presence they were opened, and the usual act thereof was recorded; the will and codicils were by their joint act deposited with deponent, and remained in his official custody in the Office of the British Consul, where they were left by deponent, when he quitted the island, in the autumn of the last year (1828); if any of the executors had acted, the testamentary papers of deceased would have been duly registered in the office of the Consul, and then delivered back to be acted upon; but as all the executors declined to act, the papers were deposited as before deposed.

"Deceased informed deponent that he was a Protestant, but had married a Roman Catholic; deponent never understood from him that he had conformed in any degree, or at any time, to the Roman Catholic religion; he did not do so in Madeira; he paid very little or no attention to religious services, but deponent does not doubt he was a Protestant; he was buried in the Protestant ground at Madeira, which certainly would not have been allowed by the Portuguese clergy, had deceased at any time, to their knowledge, conformed to the Roman Catholic Church.

Edward Porter, Esq., Acting Consul at Madeira.

"He knew deceased. In the registers of the deaths of British subjects kept in the office of the British Consul in Funchal, the death of deceased is entered. On the death of a British subject dying testate in the Island of Madeira, their wills are registered at the British Consulate; the will and codicils in question were registered as usual.

Andrew Forrest, of Lisbon, Exchange Broker.

"Deponent knew deceased from 1783, until he (deceased) went to Madeira, in 1809; deceased was continually resident in Portugal during deponent's acquaintance with him; he was the principal of a mercantile house of eminence in Lisbon; deponent was accustomed to see him at least once every week; during the period of deponent's acquaintance with him, deceased professed the Roman Catholic religion; he was married when deponent first knew him; deponent knew his wife Helena, formerly Doran, and her parents, she was born in Portugal of Irish parents; deceased had, by his said wife, three children; John, party in this cause, is the only

The Portuguese lawyers deposed that the carta, or act of naturalization, unless passed within four months through the chancery, would be null; but that the time might be extended by the favour of the crown. One indeed, Matta, said, that as it was for a naturalized permanent residence, it would take effect without passing through chancery. There

one that survived deceased; they were all educated in the Roman Catholic religion; the mother was a Roman Catholic. Deponent was in Lisbon during the occupation of Portugal by the French, and he believes that the naturalization of deceased was a protection to him, and saved his property. Of his having abjured the Protestant religion, deponent often heard his parents speak as that to which deceased had recourse for the purpose of marrying. Deponent went through the ceremony of being naturalized at the time of the French invasion: that was only an expedient on the part of deponent.

Dennis Connell, Merchant, aged 64, a native of Lisbon, and always resided there.

"Knew deceased from 1780 to 1809, when deceased left Lisbon. He never knew deceased when a Protestant; he professed the Roman Catholic religion during all the time deponent knew him, and once (in 1794) deponent was present when deceased received the blessed sacrament; all deceased's children were educated as Catholics.

The Rev. W. W. Deacon, Chaplain to the British residents at Madeira.

"Deponent since October 1821 knew deceased till deceased's death; deponent had very little communication with deceased, but during his illness he sent for deponent, about three months before his death; deponent apologized for apparent inattention, saying, that he had supposed him to be a Catholic; deceased replied, he held the Catholic religion in abhorrence; he had lived too long in a Catholic country to be ignorant that it was a system of delusion; he spoke of the ceremonies of that church as mummeries, and reprobated the whole in very strong terms; he appeared a man who had been long indifferent to all religion, though awakened to an anxiety respecting it, when illness and infirmity pressed; deceased wished, as he said, to put himself into deponent's hands, adding, that he must make up his accounts, as he was not long for this world; deponent continued his visits to deceased to the last, and deceased received and welcomed them; deponent lent him books, of which deceased afterwards expressed his high approbation, and unless deceased were a most practised hypocrite, he died a Protestant; deponent did not communicate or pray with him, for deceased did not express any wish that he should do either, though deponent gave him the opportunity of so doing. That deceased ever conformed publicly, with the religious services of either church, Protestant or Catholic, deponent does not know; he said, as an excuse for never attending the English chapel, that he was afraid of sitting in a draught of air, and must have something on his head, which would have excited ridicule among the younger parts of the congregation; deponent considered that but an excuse; during his illness, however, and as long as deponent visited him, which was as long as deceased was in a state to receive him, when he could speak but little, and was gradually sinking under the influence of stupor, deceased appeared to be, and was, as he believes, sincere in his declarations of adherence to the Protestant faith.

Januario da Costa, of Madeira, Notary public, aged 59.

"Deponent (after the execution of the will) inquired of deceased, as it was his duty to do, of what crown or kingdom he was a subject; and deceased having declared himself to be a British subject, it was so expressed in the approval.

The Rev. Joze Da Costa.

"He has been curate of the parish of St. Peter, Funchal, during the last ten years: deceased never during that period, attended or conformed to any part of the worship, service, orders, or acts of the Roman Catholic Church, public or private, to the best of deponent's knowledge or belief; deponent believes him to have been a Protestant.

"On interrogatory, respondent never saw deceased at the English Protestant Chapel; all the inmates and servants of the house in which deceased resided in Funchal were Portuguese, and Catholics; J. Bernes is a Roman Catholic, and his children have been baptized and educated in that faith; Joaquina was a Catholic.

The Rev. F. Da Silva.

"He knew deceased; he resided in the parish of St. Peter, of which deponent is vicar, from 1811 till his death; deponent has been vicar since 1815; deponent has examined the register of the parishioners, which contains the names of all persons residing in the parish, in whatever capacity, who are Catholics, and are therefore required to attend confession; that register has been regularly kept, and the name of the deceased does not appear from 1811, when he became a resident, till his death; deceased was never known by deponent to attend confession, or the public service of the church, or to conform in any way to the religious services or acts thereof at any time, in public or private; deponent does not know that deceased conformed to the worship or service of the Protestant church, but on two or three occasions deceased told deponent he was a Protestant and not a Catholic, because it would interfere with his commercial concerns; deponent believed deceased to be a Protestant, and therefore allowed him to be buried in the



was no proof that it had so passed; but the lawyers said, it could not have been recorded unless all the necessary formalities had been observed. That on signing the bond of allegiance the carta of naturalization comes into operation, and thenceforth is of full effect: the party becomes entitled to all the privileges, and is liable to all the obligations of natural born subjects of that kingdom; and some of the lawyers expressed an opinion that, in the absence of a will, valid by the law of Portugal, the effects of a person so naturalized must be disposed of as if he died intestate (a).

It was admitted on one side and the other, that the execution of the will and first two codicils was in accordance with the formalities required by the Portuguese law for a sealed will (Ordenacoens, B. 4. t. 80 and 86.(b) That to render testamentary papers valid by the law of that

ground belonging to the English Protestants at Funchal, which deponent could not otherwise have suffered to be done.

The Rev. C. Salgado, Head Vicar of the Parish of the Sé, in the Cathedral of Funchal, aged 63. "Deponent knew deceased from the time of his arrival at Funchal, in 1808; the first parish in which he resided was that of the Sé. In the parish registers of the Sé for 1810-11, the house of deceased is registered, and the names of the persons being Catholics therein are registered, but in that list the name of deceased does not occur, he is mentioned only as the occupier of the house; hence deponent saith, it clearly appears that deceased did not at that time profess the Catholic faith, or conform to the discipline, service, or orders of that Church."

(a) The lawyers were all of Lisbon, LL.DD., advocates in the Casa da Supplicação, the first tribunal of justice; and to which causes concerning wills are brought by ultimate appeal. Four were examined on each side; viz.

## FOR STANLEY.

Felipe de Medeiro . . . . .	Aged 62
Joaquim Simas . . . . .	— 24
Inacio da Matta . . . . .	— 81
Joao Ferreira . . . . .	— 78

## FOR BERNES.

Adriano Barreto . . . . .	Aged 27
Antonio da Silva . . . . .	— 40
Manoel Verdades . . . . .	— 45
Joze de Veiga . . . . .	— 34

(b) "If the leaseholder, making his will, institutes his descendants or ascendants, it will be acted as when he dies abintestate, although in the will he may bequeath his third part to any person that is not his descendant or ascendant. Sec. 4, what we say about sons and grandsons by line of descent will be observed with those of the line of ascent, viz.—Father, mother, and grandfathers and mothers, when there are none in the line of descent, because, while there are descendants, this lease will not come to the ascendants; and if there is no legal descendant, although there may be a legal ascendant, his natural son, though his father was a nobleman, shall come to it, and the spurious son shall not be entitled to the lease, unless he is legitimated by us in such a manner that he may succeed abintestate, and not in any other way. All marriages in our kingdoms are understood to be done by contract of halves, except when another thing shall be agreed, what was agreed shall be fulfilled. When any person wishes to have his open will made by a notary, he must have five witnesses, free men, or reputed such, of more than fourteen years of age, so that with the notary that writes the will there may be six witnesses; the will the notary must write in his register, and shall be signed by the witnesses, and by the testator, if he can sign, and if he cannot, one of the witnesses must sign for him, near the mark, declaring that he signs by order of the testator, because he cannot sign, and such will shall be valid. If the testator wants to make a sealed will, after writing or having his testament written by some person, he shall sign it if not written by himself: for if so written it will be sufficient, though it might not be signed by him: and not knowing how to sign, it must be signed by the person that has written it, sealed and sewed, and the testator shall deliver it to the notary before five witnesses, free men, or reputed as such, over fourteen years of age, and before them the notary will ask him if that is his will, and if he holds it to be good, firm, and valid, and if he says "Yes," the notary shall immediately, in the presence of the witnesses, make the instrument of approval on the back of the will, declaring the testator delivered it to him, and took it for his good and firm will, and the same instrument of approval all the five witnesses must sign, and the testator, if he can sign; and not being able to sign, one of the witnesses shall sign for him, declaring near the mark, that he signs by order of the testator, because he is not able to sign, and in no other manner shall the will be valid; and this notwithstanding any usage to the contrary in any place; and the notary which shall make an instrument of approval to any will or codicil, without having it signed by the witnesses, and by the testator, shall lose his office, and the instrument of approval shall be null. Sec. 2. To avoid forgeries in wills, the instrument of approval is to be written on the will, or if that is impossible, so annexed that the true will may not be taken from such instrument, and another be put

country those formalities were requisite; that the third and fourth codicils were not executed with those formalities, and were consequently invalid if the Portuguese law were to govern the case. It was further admitted, that when a marriage takes place without marriage articles, the surviving party is entitled to a moiety of the whole property absolutely: if there be legitimate issue, such issue is in like manner entitled to two-thirds of the other moiety; and over the remaining one-sixth of the whole the deceased has a disposing power: (Ordenações, B. 4. t. 46 and 82.) Thus far all the lawyers were agreed; but on other points they differed. Of those examined for Stanley, *Medeiro* thought it was necessary *expressly* to institute the issue heirs of two-thirds of the

in its stead. 3. In the absence of a notary, the will may be made with five witnesses, if written or signed by the testator, or with six, if written by another person. 4th. Provides for nuncupative wills at the point of death. If a father or a mother make a will, and knowing they have children, take the third part of their moiety of the property, and dispose of it in favour of any person they may think proper, or shall order it to be distributed after their deaths according to their wishes, although in the will the children may not be positively instituted or disinherited, such will is valid, because, as he disposed of the third part of his property in the will, and knew he had children, it seems that he wanted to leave to them the other two parts, and to institute them in the same, although he did not mention them positively, and so they must be held as instituted heirs in the manner as if they had positively been instituted in the will. 1st. And the father or mother disposing in their will of all their property and goods, making no mention of the legal children, knowing he or she had one, or disinheriting him, not declaring the legal cause of so disinheriting him, such will is, by law, null, and of no validity as to what respects the institution or disinheritance in the same made, but the legacies contained in the same will shall, in all cases, be firm and valid, inasmuch as they may come within the testator's third part, so and in such manner as if the will had been good and valid by law. 2d. And the father or mother, declaring in their will the reason why they disinherit their legal child, if the instituted heir in the will wishes to have the inheritance so disposed in his favour, he necessarily must prove such reason to be true as declared in the will, and that it is a legal and sufficient one for the child to be by virtue of it disinherited, and being proved, the will shall be valid, and the instituted heir shall have the inheritance so disposed in his favour, with no other impediment. And if he does not prove the cause of the disinheritance to be true and legal, the will shall become null, and the child shall inherit the whole of his father or mother's property if he wishes, but must pay the legacies contained in the will, as above stated. 3d. But if the father or mother, at the time of making their will, had a legal child, and believing him dead, did not mention him in the will, but bequeathed all their property and goods, instituting another heir, in such case the will shall be null, not only in what respects to the institution, but also to the legacies contained in the same. 4th. All that is above stated, as taking place when the father dies, leaving children, will also take place when he makes a will, and dies without children, but leaves grandsons or other descendants; and also when the son or other descendant dies, and makes a will, leaving no descendants, and has his father, mother, or other ascendants living. 5th. Also, if the father or mother, at the time of making their will, had no legal son, and afterwards he had one, or had one already, and did not know it, and this one is alive at the time of the death of the father or mother, this will, as also the legacies in the same, shall be null and of no effect.

"As to codicils, whether opened or made by public notary, or sealed with instrument of approval, in the back, or made and signed by the testator, or by any other private person, it is sufficient that four witnesses be present (when they are made,) men or women, of more than fourteen years of age, free, or reputed as such, so that with the notary, or with the person which makes them, there are five witnesses, upon condition that the witnesses named in the instrument of approval shall all sign the same; and when any child of an ecclesiastic, or of any other connexion reproved or punishable by our laws, or by the common law, to which the father or mother cannot succeed, because he has been so born of a reproved or punishable connexion, dies abintestate, his brother, son of his mother, although he may be born of an illegal, reproved, or punishable connexion, will succeed to him, and be his heir, if there is no other impediment but the one of being the offspring of such connexion; and also he may succeed to any other relations and kindred by the mother's side and blood; so that the brothers and the other ulterior kindred may succeed between themselves abintestate, though they may descend from a condemned and illegal connexion by the mother's line and blood; and as to what respects the succession of those who are of an illegal, though not of a condemned nor punishable connexion, what in our laws and the common law is determined will be executed.

"On the death of the husband, the wife remains in possession and in the administration of all the property, if at the time of such death she was living and maintained as man and wife,

moiety, and if the testator did not *expressly* do so, or if he left away more than one-sixth of the whole property, or left legacies to an adulterine issue, the will was void in toto. The others all agreed, that it was not necessary *expressly* to institute his legitimate issue to two-thirds of the moiety, and that if he disposed of more than one-sixth of the whole, the will was not absolutely null in toto, but only as to the excess; and that the legacies must abate in proportion; and those to the adulterine issue (if illegal) would only vitiate such legacies, and not affect the general validity of the will. *Simas* thought neither *Bernes* nor his children could take legacies. *Matta*,—that *Bernes* could, but that his children could not. *Ferreira*,—that both *Bernes* and his children could.(a)

and from her hand the heirs of her husband will receive the division of all the property remaining at the husband's death, and the legatees their legacies, inasmuch, that if any of the heirs or legatees, or any other person, takes possession of any thing belonging to the inheritance, after the husband's death, without the wife's consent, she may consider herself dispossessed thereof, and it must be to her restituted, and as from the moment that the marriage is consummated by copulation, the wife becomes entitled to the half of all the property of both, and the husband, on the death of the wife, continues in the old possession he had before, it is just, that on the death of the husband, she should remain in possession, and with the administration of all the property."

(a) *MENEZES* deposes: the formalities necessary for the validity of a will or codicil are set forth in the *Ordenação do Regno*, t. 80, s. 1, and t. 86, that any will or codicil be valid depends not only on the observance of the extrinsic formalities, but also on that which is intrinsic, for if the latter be wanting, the former are of no value; there may indeed be certain prohibited dispositions in wills that do not affect the validity of the whole instrument, as for instance, by a law passed on the 9th November, 1769, not in the Book of Laws, but altering the law found under tit. 18, of the second book; and there are others of a similar kind, the bequest of some estate in favour of a convent, in which case the particular disposition is null, and the estate passes to the legal heir, but the rest of the will is good; if a legitimate child be not constituted heir of two parts of the moiety aforesaid, or if the will contain dispositions in favour of an adulterine son, one born from a condemned connection, who is by law prohibited to succeed in any thing to his father, unless legitimated by royal patent, the will or codicil is altogether void, and of no value; 4th Book of Laws, t. 82, s. 1 and 3, t. 93, s. 1, and t. 36, s. 4. His opinion on the testamentary papers in question is, that the deceased having declared that he had a child of the legitimate marriage, and not having instituted him positively an heir to the two parts of his half of his property aforesaid, but bequeathing to him only an uncertain residue, there results therefrom an incurable nullity in the will generally, the whole of which will, together with the codicils, and every part thereof, is thereby rendered absolutely null and void, as if the same had not been written (4th Book of Laws, t. 82). It is indispensable that the father disinherit his son, or institute him positively in the said two parts, knowing that he has one, and naming him in his will; no contradiction arises in this case from what is mentioned in the *Ordenação*, Book 4, t. 82, in the beginning, and 1st sect. because in that commencement the law mentions the case in which the father positively disposes of his one-third part, without speaking of the legitimate child or children, and as he only brings the said third part into the disposition, it supposes that the children are tacitly instituted in the other two parts, and as such, the disposition of the third part is valid; but always under condition of being disposed of in favour of a person capable of being heir to such third part; in the 2d sect. the law states the case in which the father or mother makes a disposition of all the property without restricting themselves to the third part, and then the law also declares the will null, but also favours the legatees (from a pious cause), limiting them to the third part, if the legatees are proper persons to succeed to the legacies: and from this it results, in the second place, that deceased making bequests in favour of an adulterine son, and of his children, who, by the Portuguese laws, cannot be heirs to any thing of the father, if they do not appear legitimated by the Sovereign, with Royal Provisão to allow them to succeed, either in will or by intestacy, such legacies would be null, supposing that the will itself had not been a nullity in toto; as it is, the law will in no case dispense with the extrinsic formalities which it directs to be observed; it declares that in any other form it shall not be valid; if the original will and first two codicils possess the requisite formalities, the objections to them are, those only which he has mentioned; the two remaining codicils are null in toto by the want of extrinsic formalities; they have not either the approval of the notary or a sufficient number of witnesses. He leans himself also on the Roman law, which is the origin of those laws as to the rights of legitimate sons, and wills, called *infiduciosus*; the will in question, though made with all requisite formalities, is, in his opinion, null and void in all its parts and legacies.

*SIMAS* deposes: the extrinsic formalities which the laws of Portugal require for the validity of a will, are mentioned in the 4th Book of Laws, t. 80, s. 1 and 3; those for a codicil in t. 86.

Of those examined for Bernes, all agreed that the will could only be void as to the excess over one-sixth. And *Verdadas, Da Veiga*, and

When any of these be wanting, the instrument is void in toto; but if these be complied with, intrinsic formalities are still requisite; one of these is, that the party constitute an universal heir; the disposition of property which the law prohibits, made in a will having all extrinsic formalities, will make it void in the whole, or in part, as the case may be. According to the laws of Portugal, a spurious and adulterine son cannot be the heir of any part of his father's property, as is seen by reference to the 4th Book of Laws, t. 93; and in consequence, if the father, in a will made with all the solemnities, dispose to him any legacy, such legacy is void, though the will itself otherwise subsists; if a testator, having children, make a will, by which, without disinheriting them by virtue of any of the stated causes declared in the Book of Laws, No. 4. tit. 88, should supersede them, not mentioning them in the will, and should dispose of all his property to a stranger, such will would be null in toto, as appears from tit. 82, in the 4th Book of the Laws. If the will should contain such a disposition of property, as that the issue be not disinherited, but is appointed to receive under it less than two-thirds of the moiety aforesaid, to which they are absolutely entitled, the will is not null in toto, but the legacies to others must abate in proportion, so as to make up the two-thirds-for the issue; a child must either be disinherited, and be declared to be so by the will, for some cause allowed and specified by the law, or be entitled absolutely to two-thirds of the property which the parent had a right to dispose of by will, that is, of his own moiety of the whole, in the present alleged circumstance; as to the rest of his property, he may dispose of it as he pleases, except to such persons as are forbidden by law to inherit. In regard to the will and codicils in question, of the third part of the moiety of which deceased could dispose to strangers in blood, or generally as he pleased; he could not dispose in any hereditary manner, in favour of his natural son. That it is an unanswered principle in the Portuguese law, as in the Roman law, that there is a reciprocity in the right of succession, that is, when the father cannot be an heir to the son, the son cannot be an heir to the father. *Ordenação*, Book 4. t. 93, positively declares, that the father cannot be an heir of a son born from reproved or repudiated connection, and in consequence the son cannot succeed to the father. It is also declared in the *Ordenação*, Book 4, t. 92, s. 3, that the person which is not a piao, that is, has some kind of nobility, and has legitimate sons and a natural son, cannot dispose to the natural son of the whole or any part of his one-third; in Portugal, merchants of great traffic are not piao, and in consequence, if deceased was, when Bernes was born, a merchant of great traffic, he could not have bequeathed to him any part of his remaining third of property, although Bernes had not united in him the qualities of spurious and adulterine, but had been only illegitimate; in consequence deponent judges, that according to the laws of Portugal, the will of deceased is null in all parts where he disposes of more than one-third of the half of his property; and also null in what he disposes of in favour of Bernes and the children of Bernes, because they all participate in the same disqualification; it is null also in the point where deceased prohibits his legitimate son from inquiring into the transactions which deceased had with the natural son, not only because thereby the laws would be evaded, but because if Bernes were even a legitimate brother of Stanley, the latter would have, notwithstanding any prohibition of his father, a right to investigate what the other had received from their father in his life-time, *Ordenação*, Book 4, t. 97. He thinks the will to be null also in the parts where a penalty is put upon the legitimate son, in case of his opposing himself to the dispositions made by deceased, because deceased had not the power of altering the laws, or of imposing any penalty on asking their observance, and requiring the judgment of nullity of all acts contrary to them, and such penalty being a legacy in favour of a spurious son of condemned connection, is of course as null as any other legacy given to him; the will is null also in so far as it institutes the son, Stanley, heir only conditionally; whereas he being the forced heir of deceased, the father could not in any manner restrict the institution of him as such; the will is also null, inasmuch as it disposes of the son's property, because the father was not the owner of it; these nullities do not however entirely annul the will, which must subsist in what respects the other legacies included in the one-third of deceased's moiety; *Ordenação*, Book 4, t. 82, s. 1; it being a rule in Portuguese law, that he who cannot be an heir by will, cannot be such by a codicil; the codicils in question are null in all that relates to the disposition in favour of Bernes and his children; in the rest they are valid if they possess all requisite formalities.

MATTA says: All legacies to a spurious and adulterine son are void in toto, for such child can inherit nothing from a father; the law, at Book 4, t. 93, declares, that such a father cannot be heir to such a son, and, by reciprocity, the son cannot inherit any thing from a father; but the legacies to the children of Bernes are not void, they may be liable to diminution or abatement, as conflicting, if they do so, with the rights of the widow and the lawful children, but they are not necessarily invalid; the condition of their father does not attach to them, and they take as individuals, irrespective of their father's inability to inherit.

FERREIRA deposes:—It is not the opinion of deponent that an adulterine offspring can in no case inherit any thing from his father; he is aware that some advocates maintain a different opinion, and found it upon the 93d title of the 4th Book, but that law, he considers, refers only

*Barreto* said generally, after a perusal of the will, that it was good as far as the disposition of the one-sixth went. *Da Silva* more precisely said: "in his opinion the legacies to Bernes were not void, for, with reference to the law found in Book 2nd, t. 35, s. 12, he thought that Bernes, though a spurious and illegitimate child, might inherit from his father as a legatee in his will."

The cause now came on for hearing in the PREROGATIVE COURT: when the proctor for Bernes prayed the judge to pronounce for the will and four codicils, and addition; and to decree administration with these papers annexed to his party, and to condemn Stanley in costs. The proctor for Stanley prayed the judge to pronounce against the will, codicils, and addition; [the will and first two codicils were, in argument, admitted;] and to decree administration of the deceased, as dying intestate, to his party.

The *King's Advocate* and *Phillimore* for Bernes (a).

Execution and capacity are not denied: the question is one of law,—whether, in this case, testamentary papers must be executed according to the forms of the Portuguese law. No question will arise as to the will and first two codicils. It was, at first, indeed, said, that the will is repugnant to the law of Portugal; but it clearly appears from the evidence, that it is void so far only as the deceased has disposed of more than one-sixth of his whole property; and though an adulterine issue cannot inherit, a legacy to such does not render the will void in toto. The expressions of the will and second codicil, admitted to be valid and to have been executed when the testator was perfectly capable, show strongly his desire to effect the disposition in favour of his natural son and his issue: the codicil of October, 1825, disposes exclusively of property in the English funds in favour of such issue. We shall contend, 1st, that the evidence does not establish that the testator, notwithstanding his long residence in Portugal, was a domiciled subject of that kingdom, for that he intended not to finish his days there, but to return to his native country, and that he frequently declared that such were his intentions; he remitted his money for investment in England, and sent his wife, who became deranged, to Ireland—his native land,—and he always claimed the privileges of a British subject, which were not denied to him by the Portuguese authorities.

If the Court should have any doubt upon this point; we contend, 2dly, that, by the law of England, the will of a British subject, disposing of property in this country, though the testator may have been domiciled abroad, is valid in this Court, if made according to the law of England.

to cases where a person had died intestate, and under an intestacy: he considers it clear that an adulterine son cannot inherit, but he is not satisfied that the law referred to prevents a father from instituting an adulterine son heir by will, when there are no legitimate children, and he has seen cases adjudged to this effect, but as in this country there are no authorized reports of cases adjudged, nor even any record of them made by the courts, he is unable to refer to any such; admitting that an adulterine son cannot be instituted an heir by his father, this would not affect the right of such father to bequeath to such son any part, or the whole of that third, over which he had an absolute power, as to which deponent considers the legacies to deceased's natural son, though adulterine, to be undoubtedly valid, and a portion of the legacies to the children of that son are good in law, so far as the aforesaid third part of the deceased's property, over which he had absolute power, extends; they will be liable to abatement, but they are not void in law.

(a) The arguments both in the Prerogative Court, and in the Court of Delegates, are principally confined to the points of law; and in reporting the arguments in the latter Court, a repetition of those urged in the Prerogative Court has been generally avoided.

In the present case, if the instruments are not valid according to the law of Portugal, they are valid as to property in the country, and are here entitled to probate. They are executed in the presence of three witnesses, and are exclusively confined to property in England. They are not executed, and do not purport to be executed, according to the law of Portugal; whereas the will which disposes of property in Portugal is regularly executed according to the Portuguese forms.

1st, as to the domicil. The domicil of origin continues till another is acquired—*Somerville v. Somerville*, 5 Ves. 750. Did the deceased acquire a new domicil? The marriage in Portugal shows but little intention of changing his domicil; the lady though born in Portugal was of Irish parents. But the Court has not to judge of his intentions merely from circumstances. It has before it, in these instruments and in facts proved, that the deceased did not intend to throw off his character of a British subject: he could not divest himself of his allegiance, though he might owe a temporary alligiance to the state wherein he resided. An intimate connexion has always subsisted between the two countries. Treaties have taken away the distinctions between their respective subjects. The ports of the United Kingdom are to the Portuguese like the ports of their own kingdom; and the subjects of one kingdom are treated like the subjects of the other. Madeira is like a British factory, and the British consul there has the custody of English wills, and, as such, has the custody of this will. His taking the oath of allegiance, his formal abjuration of the Protestant faith, his marriage, are of no weight: the only point is, whether his continued residence in Portugal is sufficient to deprive him of the character of a British subject, and give him the character of a person domiciled in Portugal. We submit, not; his intention to return to England, and that he considered himself a British subject, and was admitted so to be by the Portuguese authorities, being proved by incontestible evidence. To create a new domicil, two things are necessary—actual habitation, and a wish to fix it there permanently. Den-  
isart, tit. Domicile, s. 11.

Now assuming that the deceased was domiciled in Portugal; no doubt a native Portuguese subject is bound to adhere to the forms of the law of Portugal for testamentary purposes, and if he had not so adhered he would be considered to be dead intestate; but is the law of Portugal binding on the subject of any other country domiciled there? Though it has been laid down generally, that succession to personal property ab intestato is to be governed by the law of the country where the party is domiciled, it does not follow that a British subject, domiciled in a country other than that of his origin, is bound to conform, with regard to the disposition of his property by a testamentary act, to the laws of the kingdom where he was domiciled, that property being situated in the country of his origin, and the instrument not purporting to be executed according to the formalities required by the *lex domicilii*. There is no decided case even as to intestacy, in which there has been a question between a foreign domicil and a domicil of origin; all the cases are between two British domicils. And, as to wills, there is no case even that an English subject domiciled in Scotland is bound by the law of Scotland as to the disposal, by will, of his English property; or vice versa, that a Scotch subject, domiciled in England, is freed from the restraints of the Scotch law as to his property in Scotland. The consideration of this point has arisen only with respect to intestacy: but testamentary ques-

tions are to some extent *juris gentium*, and the general result of the opinions of writers on the law of nations is, that in Europe there is nothing to restrict persons, not natives of the country in which they reside, from disposing of their personal property according to the law of their own country: nor, from the evidence of the Portuguese lawyers, does it appear that there is any thing in the law of Portugal which should prevent a British subject, established at Madeira, from making a will and disposing of his property in England according to the forms of the English law. Vattel says (Liv. 2, c. 8. s. 111,) "if a traveller makes his will and sends it sealed into his own country, it is the same thing as if the will was written in that country." Here the will and codocils were deposited in the archives of the British Consulate—which is equivalent to sending them home. Is there any thing in the English law to render such a will invalid? In *Curling v. Thornton*, 2 Add. 6, the Court decided that, under particular circumstances at least, a British subject is not bound in the disposition of his property by will to conform to the law of the country where he was domiciled. If an acquired domicile so totally destroys the character of a British subject, that it operates against the distinct expressions of his testamentary intentions, it is impossible to support these papers: but, as in all countries, intention governs testamentary acts, the Court would struggle hard against a doctrine requiring it to pronounce invalid instruments so clearly and unequivocally expressing the intentions of the testator. There is no case which imposes upon the Court the duty of pronouncing that a British subject, by taking up his residence in a foreign country, has divested himself of his British character so far as to render invalid, even for the purposes of probate, his will not purporting to be executed according to the forms of a foreign country where it is asserted he was domiciled, but regularly executed and attested by three witnesses, and containing his express and deliberate intentions as to property situate in this country, to which he owed his origin. In this absence of direct authority, the onus of establishing the disqualifying position rests with the other side.

*Lushington and Addams*, contra.

We confine our opposition to the last two codocils. The Court can hardly be of opinion that the deceased was not a domiciled subject of Portugal at his death: if so domiciled, the intention of returning to his native country would not vary the case. His domicile of origin was undoubtedly Ireland; but he acquired a Portuguese domicile, which cannot be put off but by the acquisition of a new one. We contend that the law of Portugal governs this case; and that the Court can only try the validity of the instruments by the Portuguese law; and it is admitted that, by that law, the last two codocils are null and void. It is true a British subject cannot shake off his allegiance, but he can acquire a foreign domicile. 3 Inst. c. 84. pp. 177-9. 2 Dyer, 165. b. A British subject quitting England, and proceeding to the United States, can trade to India; Lord C. J. Eyre laying down in *Marryatt v. Wilson*, 1 B. and P. 443, that a British subject violated no law of his parent state in procuring himself to be received as a subject of the United States, but could enjoy all the privileges conceded to the other subjects of the state which has adopted him. It is impossible then to contend that a British subject may not change his domicile, though that cannot destroy his allegiance. The question is, did Mr. Stanley become domiciled in Portugal;—not, whether he became a subject of Portugal? A man may be domiciled in

a country where he may never be admitted or deemed a subject, yet his personalty will be governed by the law of that country even when the law of the domicil shall say that personal property shall go by the law of the forum originis.

The facts of this case leave the domicil beyond the possibility of doubt; the deceased was married in Portugal; all the essential consequences of the married contract attached to him under the law of Portugal: he was naturalized; received a pension; took the oath of allegiance; and he resided within the Portuguese territory for fifty-seven years, without any absence, and without having returned to his native land for a single hour. In *Curling v. Thornton*, it was not decided that the will was good because the deceased could not acquire a foreign domicil, nor, if he had acquired it, that the law of domicil would not govern the case; but that he had not acquired a domicil in France. He had been out of the country only a short time; his goods were here; he had a house here; he visited this country occasionally, and his will was not only conformable to the laws of this country, but was made in this country, and was a will in which British subjects alone were concerned. Here the legatees are all Portuguese; the deceased had been long resident in the Portuguese territories; he had no house here; he never visited this country; his will was not made here, and was not to be carried into effect here. In the *Duchess of Kingston's case*, (cited in *Curling v. Thornton*, 2 Add. 21,) the will was admitted to probate here, because she was not naturalized in France;—but in this case the deceased was naturalized in Portugal. The whole history of his life—all his connexions—were Portuguese; it is not even shown that he considered himself an Englishman, or ever seriously contemplated returning to England: nor would the *animus revertendi* be sufficient. *Bruce v. Bruce*, 6 Bro. P. C. 566 (a). There, notwithstanding a clear intention to return to Scotland—his *forum originis*—and his remitting money to that country, in furtherance of that intention; notwithstanding that no European can possess real property in India; and that all the servants of the Company have necessarily an *animus revertendi*, yet Mr. Bruce, being in that service, was held to have acquired a domicil in India;—and this, by a decision of the House of Lords, upon which all the law, learning, and research of the ablest men of the day were concentrated.

But it is said, the relation between England and Portugal is very intimate: if so, the more nearly does it resemble the relation between England and Scotland; and the more directly do the decisions on questions of British domicils bear on the present case. It is true, that residence in a factory does not change domicil: but then that must be residence in a factory as a British subject.

The Portuguese domicil then, being established, what law is to govern the decision? The ruling doctrine is—*mobilia sequuntur personam*. Testacy, and intestacy;—bankruptcy, lunacy, and all the other relations as to personal character, or personal property, are governed by the *lex domicilii*, in opposition to the *lex loci rei sitæ*—no matter where the property is—though real property is liable to the law of the country. If, between England and Scotland, in a case of intestacy, the *lex domicilii* governs the personal property; on the same principle the proposition,

(a) See Lord Thurlow's judgment in *Bruce v. Bruce*, reported in a note to *Marsh v. Hutchinson*, 2 B. and P. 229.



above stated, may be maintained. It is admitted to hold as to our colonies, in which French, or Dutch, or Spanish law prevails separately or mixed. But the more general proposition is also fully established. In all the cases, whatever may be the individual circumstances, they are argued upon the principal of intestacy entirely; but if a court of common law adopts the principle in cases of lunacy and bankruptcy, it may be applied to cases either of testacy or intestacy. In *Balfour v. Scott*, 6 Bro. P. C. 550, the House of Lords are said to have decided that the *lex domicilii*, and not the *lex loci rei sitæ*, governed the whole movable succession of the deceased—both testate and intestate; though his personal property might be in different places and under different laws. In *Hog v. Lashley*, 6 Bro. P. C. 577, the question arose on two interlocutors, where the Lord Ordinary in one, and the whole Court of Sessions in the other, found that personal effects—wherever situated—must be governed by the *lex domicilii*: this was affirmed by the House of Lords in 1792. In *Ommaney v. Bingham*, (Sir Charles Douglas' case, see 5 Ves. 757, et. seq.), decided by the House of Lords in 1796, and in *Drummond v. Drummond*, 1799, 6 Bro. P. C. 601, it was admitted, that it could no longer be disputed that the *lex domicilii*—not the *lex loci rei sitæ*—governed the whole question (a). The same principle governed the decision of this Court in *Ryan v. Ryan*, 2 Phill. 332.

(a) The decisions of the House of Lords in the cases of *Ommaney v. Bingham*, (Sir Charles Douglas' case,) and of *Hog v. Lashley*, are the most direct to the point, that the *lex domicilii* applies to cases of testacy as well as of intestacy.—However in those cases the question was not whether the deceased was testate or intestate, but, being testate, by what law his will was to be construed.—Neither case expressly decides that a paper must in order to be entitled to probate in an English Ecclesiastical Court be executed according to the formalities required by the *lex domicilii*—whether that domicile be a British or a foreign domicile.—The main circumstances of Sir Charles Douglas' case and a portion of Lord Loughborough's judgment in it will be found 5 Vesey 757-9. And at 3 Vesey 202-3, the effect of the judgment is stated by Lord Loughborough himself. See also 6 Bro. P. C. 550. From a reference to the will and codicil proved in the Prerogative office, it appears that they were both executed according to the English forms and were attested by three witnesses. The will is dated on the 13th of May 1788, and the codicil on the 11th of October 1788: at neither of which times was the testator in Scotland; and one of the witnesses to the codicil is described as notary public, London, and the two others as his clerks. It probably therefore was executed in England. The will appoints two gentlemen described "of London" and one of "Gosport" executors and trustees: all the property disposed of was in the English funds except 5000*l.* lent in 1765 on the estate of Langton in N. B. and two flats in Edinburgh purchased in 1771, which flats he directs to be sold and the money to be invested in the *English* funds,—he leaves to his wife the use of the furniture in his dwelling house.

It does not appear by the will where this dwelling house was, but it is stated, in 5 Ves. 758, to be at Gosport—and was probably so proved to be by extrinsic evidence.

The codicil, which was the subject of question in the case of *Ommaney v. Bingham*, recites, that one of his daughters had formed an attachment for, or been married to, a gentleman at Gosport, and directs that in case such marriage had already taken place or should thereafter take place, she should forfeit all benefit under his will, and her share should go to his other children. It was contended that this condition in restraint of marriage was void by the law of Scotland, but valid by the law of England by reason of the bequest over. The House of Lords held, that the law of England—his domicile—was to prevail: the effect of which was not only that the law under which the deceased intended to make his will governed the succession; but also that his intentions were carried into effect.

In *Hog v. Lashley*, the instrument was executed in Scotland by a Scotsman resident there, and solely with a reference to the formalities required by that law. The paper is in the form of a Scotch settlement. It describes the deceased as of Newliston, N. B.; it disposes of several real estates in Scotland; it directs all his personality to be invested in the purchase of landed estates in Scotland; it gives to his eldest son, among other things, his household furniture (except the household furniture and plenishing of his house in London, which he had already given off to his second son); it speaks of money in the public funds, and of shares in the Bank of Scotland, and of annuities in the French funds. The deceased had, however, attempted to dispose of more than the law of Scotland permitted, and to exclude Mrs. Lashley of

The inconvenience of adopting the *lex loci rei sitæ* is manifest; e. g. if a person died possessed of personal property in England, France, Rus-

her legitim—a moiety of the moveables. The Court of Session, whose decree was affirmed by the House of Lords, pronounced that the *lex domicilii* ought to prevail even though part of the property was situate in England: but it will be observed, that though the intentions of the deceased were thus defeated, *that law under which the deceased intended to make his will governed the succession.*

A suit respecting the claim of this paper to probate in England was instituted between the same parties in the Prerogative Court of Canterbury, and thence appealed to the Delegates. An allegation propounding the instrument pleaded the execution of the paper on the 5th February, 1787, at Edinburgh: capacity—death at Alverstone, in the county of Edinburgh, in 1789—registration of the original on the 13th May, 1789, and that No. 1, the paper propounded, was an authentic copy. It then prayed probate of such copy to be granted to Mr. Hog as executor, and Mrs. Lashley to be condemned in costs. This allegation was opposed on the ground that the paper was not of a testamentary nature—but was admitted.\* From this admission an appeal was prosecuted to the Delegates, and Mrs. Lashley prayed the Court to reject the allegation, or to suspend the consideration of the admission thereof till the proceedings thereon depending in the Court of Scotland respecting the paper propounded were determined.

Sir William Scott, Sir John Scott, Dr. Nicholl, Mr. Adam for Mrs. Lashley.†

Our prayer is either to reject the allegation altogether or to suspend its admission. The paper is not testamentary; the whole language, purview, and entire contents show this. There is by the English law a distinction between a will and a deed. A will passes no present interest; a deed does. This instrument gives a present interest both in reality and personally; it converts the testator into a tenant for life with reversion to another. It is not then a testamentary disposition by the law of England: but the deceased was a domiciled Scotsman, and by the law of Scotland (as may be gathered from the dictionary of decisions, a book of perfect authority in Scotland) the mere nomination of executors and testamentary words do not make a testamentary instrument, if, upon the whole view of the instrument, it appears to be a disposition *inter vivos*; if however the character of the instrument—a Scotch instrument throughout, executed according to the forms of Scotch law by a man domiciled in Scotland—be dubious according to the ideas we possess of that law, it ought not to have been propounded in this simple manner, but as a foreign will,—as a will according to the law of Scotland. In wills of Englishmen only in itinere, the Court does not inquire into foreign law; but in the will of a Frenchman or a Dutchman, made in his own country, the Court engrafts its own probate on the probate transmitted from that country. So a probate here binds the Judge in the plantations. *Burn v. Cole*, Ambler, 415.

It must not be forgotten, that the question is not what will be the effect of the instrument propounded as a will as to its efficacy in disposing, or not, but whether in its nature it is to be considered as testamentary, and entitled to probate, regard being had to the domicile of the testator. If you say you will not grant probate, you do not exclude any claim to the effects that Mr. Hog may have; for, if it is a deed, to refuse probate of it as a will is no injury, since then the question

\* The following expressions occur in the paper, some pointing to a conveyance *inter vivos*; others to a testamentary disposition.

"Being determined after my decease that all my estates, which I have not disposed of in my lifetime, shall be entailed as Newliston, and all my personal estate shall after my decease be invested in the purchase of lands in same entail as Newliston."—"With full power to my son after my decease, to intromit with the hail subjects and to sell, &c., as fully as I could in my own life."—"I recommend my son to execute my intentions with all convenient despatch after my decease."—"As soon after my decease as may be, to realize the subjects hereby conveyed, after discharging all debts, legacies, donations, and burthens"—"to take effect at my death"—"this disposition, assignation, and conveyance."—"I do hereby give, grant, dispose, assign, and make over to my son, in case he survive me, all land that shall belong to me at my death, and shall not at that period be otherwise disposed of by a deed under my hand duly executed, and all my real and personal estate which may happen to belong to me at the time of my death, and not otherwise disposed of."—"I do hereby nominate, constitute, and appoint my son my sole executor and universal legatee and intromitter with my goods and gear, with full power to him, immediately after my decease, to meddle and intromit with the hail subject before disposed to him, and that in virtue of this present right, and without the necessity of confirmation, administration, or other form of law."—"I declare that these presents, though found lying by me at the time of my decease, shall be as valid as if delivered to my son, with which delivery I dispense and consent to the registration hereof."—"Provided always, as it is hereby specially provided and declared, my son is to be bound and obliged, and as by accepting thereof he shall bind and oblige himself to execute my intentions."

† The argument as to the testamentary nature of the paper is omitted.

sia, and Holland, his succession would be regulated by four different laws; but in the present case the testator is not only domiciled in Portugal but

would be open elsewhere as to the effect it shall have. Supposing you grant administration; if it be no disposition, a distribution as in a case of intestacy would be made; on the other hand, if it should be held a disposition by deed, the administrator would be accountable and bound to distribute according to the deed: so also, if by the law of Scotland it be a will, the deceased being a domiciled Scotsman.

It is now too late to contend that in the construction of instruments the will of a domiciled Scotsman, proved in the ecclesiastical courts in England, will have a different effect from what it would have in Scotland. The law, by the latest decisions, is, that effects in intestacy are to be distributed by the *lex domicilii*. In *Bruce v. Bruce*, 6 Bro. P. C. 566, this was held to be clear law to set the Lords of Session right. *Brown v. Brown*, 1b. 596. *Pipon v. Pipon*, Ambl. 26. *Erskine's Institutes*, 1. 3, T. 9, s. 4, (6 Bro. P. C. 582.) *Thorne v. Watkins*, 2 Ves. Sen. 35. In this case the Court of Sessions have proceeded according to that law, and have held it to extend to English effects alone.

By the acts which regulate the transfer of stock, stock cannot be disposed of but by a will executed in the presence of two witnesses: but if a person in Scotland or Holland make a will, valid by the law of his country, though not thus attested, it would not pass the stock, as to which he would be intestate here: yet by the principle of the law of nations, the representative of the deceased must be the trustee of the legatee. If an Englishman makes a will, giving all his effects to his son or a stranger, the rest of his family will be disappointed, but a Scotsman can do no such thing. If this instrument is to be considered as a will of a Scotsman, a moiety of the effects only will pass by it, as a will: as to the other moiety he is intestate. *Kilpatrick v. Kilpatrick* (6 Bro. P. C. 584), where Lord Kenyon sent to Scotland to inquire, and being informed that a Scotsman could only dispose by will of a moiety of his effects made a decree in conformity to that law.

Suppose a domiciled Scotsman in Scotland makes a nuncupative will clearly against the statute, consequently not good by the English law; and suppose in Scotland it were good; the ecclesiastical Court in England could grant no probate, yet the persons entitled under it by the law of Scotland would be authorized to come to an English court of equity, and on proof of the law, have an account of the effects as against the administrator. This supports the argument in favour of our client, and is the application of the very principle laid down in *Thorne v. Watkins*. Being intestate here, the Ordinary could, by statute, only grant the administration to the widow or next of kin; but the administrator would be bound to distribute according to the will valid by the law of Scotland. That is precisely the case of *Thorne v. Watkins*. The right accrued in Scotland, but the deceased being domiciled in England, the administrator was bound to distribute by the law of England. If to recover the effects in Scotland it had been necessary to sue as the representative of the intestate, and administration had been taken in Scotland, the administrator would still have been made to account by the law of England.

This allegation, if admitted, can lead to no decisive conclusion; nor will the rejecting of it bear hardly on Mr. Hog's interests. As a deed this paper, if valid, is good without administration. By the law of England, it clearly is not testamentary; but if valid by the law of Scotland, (and the will of a domiciled Scotsman, wherever the property to be disposed of is situate, admits of a different consideration from the will of an Englishman,) Mr. Hog can have relief in a court of equity. If however you will not absolutely reject, your Lordships will at least suspend the admission of this allegation. If the instrument is to be set up as a Scotch will, Mr. Hog should have pleaded that it was a valid disposition by the law of Scotland, and should have had a probate engrafted on the Scotch probate. Your Lordships will not assume the character of foreign jurists and foreign judges. What may be the effect of your judgment, if you admit this paper to probate? You may decide that to be a testament which the proper tribunal of the country shall decide against. If the question was proper at first to have been decided in the Scotch Courts, there will be no impropriety that the case should stand over. The effects are to be governed by the Scotch law, and an actual decision has been given in Scotland that our party is not excluded from her legitim. Still by your probate, Mr. Hog would get possessed of all the property without giving security. If the property is in a precarious state, we should have no objection to a joint nominee for administration pendente lite.

The Court, Perryn, Baron; Heath, J., and Grose, J.: Arnold and Laurence, LL.D.; without hearing Mr. Hog's counsel, affirmed the decree of the Prerogative Court, with the costs of the appeal, and retained the cause.

Witnesses having been examined by Mr. Hog, but no plea given by Mrs. Lashley, the Judges after hearing counsel for Mr. Hog only\* pronounced for the will, but at Mrs. Lashley's prayer, directed an act on petition to be entered into as to whether a general or limited probate should issue.

\* It is presumed, Mrs. Lashley did not by counsel oppose the sentence pronounced for the will.

married a Portuguese wife, and all the rights of that Portuguese wife are governed by the law of Portugal. The obligations that attached to him on that marriage made his property divisible in certain proportions

The substance of the petition was :—that the deceased died at Newliston, N. B. on the 19th of March 1789, possessed of personalty in Scotland, England, and France, very considerably exceeding his debts ; he left, among several children, Thomas Hog, his eldest son—the respondent—and Rebecca (wife of Thomas) Lashley his daughter—the appellant : he executed certain deeds of settlement, and among others a general disposition, (the will in question) containing a nomination of executors, dated 5 Feb. 1787, in favour of the respondent of lands and of all his personalty in Scotland, England, and France, burthened with debts, legacies and provisions to younger children ; the residue and interest to be employed in purchasing land to be entailed on the series of heirs in the entail of Newliston : that he had executed two bonds in favour of the appellant exclusive of her husband's *jus mariti*, one for 1300*l*. containing a declaration that it should be in full satisfaction of all portion, natural, legitim, bairns' part of gear, or other claim on his or his wife's death : and another for 200*l*. exclusive of the *jus mariti*, but without the declaration. That these bonds, being short of her legal claim, she and her husband called, before the Court of Sessions in Scotland, the respondent to account to them for half of the deceased's moveables as legitim, and for her third of the goods in communion at the dissolution of the marriage, to which the children were entitled as next of kin of their mother ; that in defence, Hog had contended that from certain letters it appeared Mr. and Mrs. Lashley were satisfied with the provisions made by her father, and were thereby barred from demanding legitim, the deceased having it in his power by a suitable and rational provision for Mrs. Lashley, calculated bona fide for the performance of his paternal duty, to exclude her claim of legitim ; that certain renunciations by his other children operated in the deceased's favour, and Mrs. Lashley could demand no more as legitim than if these renunciations had not been made, and that in estimating her claim either for legitim, or as next of kin of her mother, the personalty in England or France was not to be included. That in answer, Mr. and Mrs. Lashley had contended they had never accepted these provisions ; that the deceased could not exclude her by any testamentary deed from her legal claims ; that as the other children were forisfamiliarized, and did, in consideration of the patrimonies they received, renounce their legitim, she was now entitled to the whole legitim, i. e. a moiety of the whole personal estate ; and that as all such questions must be regulated by the *lex domicilii*, the claim extended as well to the English and French as to the Scotch personalty. That the cause came on first before the Lord Ordinary, and then before the whole Court of Sessions, who, after several hearings, on the 7th of June 1791, pronounced, first that the succession of personal estate of the deceased, wheresoever situated, must be regulated by the *lex domicilii*, and that Mrs. Lashley's right of legitim extends to the personal effects in England, or elsewhere, as well as in Scotland. 2ndly, that the renunciation of legitim by the other younger children operated in favour of Mrs. Lashley, and had the same effect as their death : and she, the only younger child who did not renounce, was entitled to the whole legitim,—one half of the free personal estate wheresoever situate. That on the 29th of November, 1791, after further petitions, the Lords adhered to this interlocutor, and on the 23rd of December, further decreed that certain government annuities in England belonging to the deceased were moveable, and fell under the claim of legitim. That on the 7th of May, 1792 these decrees were affirmed by the House of Lords (see 6 Bro. P. C. 577. 591. 621) ; that consequently Mrs. Lashley was entitled to a moiety of the personal estate in her own right, and that any disposition thereof by her father was null, and that he had no power to appoint an executor in respect thereto : but that he must be considered in point of law to have died intestate as to the same ; Mrs. Lashley therefore prayed that the probate might be limited to a moiety of the personal estate of the deceased in England, the only part over which he had any power to devise, or appoint executors ; and that administration of the other moiety pronounced by the decrees of the Court of Session (affirmed by the House of Lords) to be the sole property of Mrs. Lashley, and over which no executor appointed by the deceased ought to have any power, might be granted to Mr. and Mrs. Lashley on security to pay a proportionate share of such debts as might be legally chargeable thereon.

On the other side the decrees, &c. were admitted ; but it was submitted, that by law the respondent was entitled to a general probate as sole executor, whatever might be the effect or operation of the will in regard to the duty or office of executor so appointed.

The Judges having heard counsel on both sides, rejected Mrs. Lashley's petition, condemned her in the costs, and decreed a general probate to Mr. Hog.

By the admission of the allegation the Court of Delegates seem to have decided, as Sir William Wynne (in the Prerogative Court) had before decided, that the instrument was by the law of England testamentary ; and inasmuch as the case of *Bruce v. Bruce*, then so recently determined, and the doctrine of the *lex domicilii* was pressed by counsel, the refusal to suspend the allegation infers that in their judgment the decision of the Scotch Courts ought to make no difference in their sentence ; and that the paper would be entitled to probate here whatever might

between the husband and wife, and he could not deprive her of it. How then can it be asserted, that the *lex domicilii* does not govern the distribution of property? On the same principle it governs the forms on which the validity of a will must be established. Suppose an individual goes abroad knowing nothing of the English law; he makes an instrument valid according to the forms of the country in which he resides—perhaps a nuncupative will—what a hardship it would be, that such will should be vitiated in this country.

*Per Curiam.*

All this argument is equally applicable to real property. The true question is, whether a British subject who has acquired a foreign domicile is deprived of the right of disposing of his British property according to the forms of British law. Is there any decision by which, in a case of testacy, the *lex domicilii* has been applied so as to avoid a will executed with reference to the law of the country where the property was situate, and so as at the same time to defeat the intentions of the testator? In the present case, if the law of Portugal is to prevail, neither the law, which the deceased contemplated as governing his testamentary acts, will prevail, nor will his intentions be carried into effect. Is there any decision going to that length?

*Argument continued.*

We do not take the point as one that has received a distinct decision. It is said, whatever is the law, you may grant probate and leave the consequences to be disposed of by another Court. The question for the Court to decide is, whether the deceased died testate or intestate according to law; as, in the case of the will of a married woman, you must decide whether she is testate or intestate according to the power. If the question were mixed with other questions belonging to other jurisdictions, it might be a ground for leaving it to another Court; but it is one of those questions infinitely better known to those who are familiar with the civil law and the public general law. The codicils are ipso facto null—not invalid in part: it is therefore contrary to the practice of the Court to grant probate of such papers and then send them for construction to the Court of Chancery. Here was no conflict of domicils: the deceased *lares constituit* exclusively in Portugal. There is no doubt in case of intestacy, that his property must be distributed according to the law of Portugal; and in the absence of a paper valid by that law the deceased is intestate as to this property (a).

*Per Curiam.*

Is there any case in which a party domiciled abroad has executed an instrument for the disposal of personal property in England?

*Dr. Lushington.*—The only case I am aware of is that of *Mr. Wad-*

be its character in Scotland. It would therefore appear that the Court of Delegates, in *Hog v. Lashley*, proceeded on the same principle as the Prerogative Court in *Stanley v. Bernes*. It is believed that there is no note extant of the arguments of counsel, as to any of the proceedings when the Court pronounced for the will, or when it subsequently rejected *Mrs. Lashley's* petition for a limited probate. The latter decision, it is conceived, has no bearing on the question in *Stanley v. Bernes*, since whichever law governed the case, *Mrs. Lashley's* legitim, as forming part of the deceased's estate, could only be obtained through a representation to him, and she therefore stood very much in the same situation as a next of kin entitled to an undisposed residue. The executor as the deceased's general representative would be trustee for her, and be compellable in a Court of equitable to account for the legitim.

(a) 1 Hale, P. C. 68. Henry's Judgment of the Court of Demerara, &c. *Hunter v. Potts*, 4 T. R. 192. *Sill v. Worwick*, 1 H. Bl. 690. *Philips v. Hunter*, 2 Ib. 402. *Brodie v. Barry*, 2 V. and B. 131, were cited for *Mr. Stanley*.

dington, who went to reside in France and remained there several years, and by a will executed in France disposed of his property here; and the Court of Chancery applied the French law (a).

(a) Case of Mr. Waddington drawn up from a comparison of the statements furnished to the Court on either side.

"Mr. Waddington—a British-born subject, previously resident in England—went to France in 1813, where he purchased an extensive farm; and also mills and premises in which he carried on the business of a cotton-spinner. In 1816, he became by letters patent a naturalized French subject, and resided in France till his death in 1818: he left eight children—some minors,—and also real and personal property in France, and personal property in England: he made, in January, 1818, at the same time, two wills; one in the English form, by which he gave all his property in England, and also a claim he had upon the French government (and which he had lodged with the commissioners in England for receiving such claims,) to six of his children equally. The other will was in the French language, and by that he gave his manufactory to two sons, being the two not named in the English will; but he directed certain debts and money in France to be paid to his other children, "in order to establish amongst them a perfect equality in conformity to the will, which I have made in the English language and forms:" the French will concluded:—"As my will of the 19th of this month has only for its object to provide for a prudent administration and equal distribution of my property and funds which I possess in England, I declare, as far as may be needful, that I make all my children my heirs in equal portions of all my property (except my real property with the appurtenances) acquired by me in France, which it is hereby understood that I dispose of by the present will, subject to the charges and conditions which are contained therein."

Thomas and William, named in the French will, were naturalized French subjects: the other children were not. The executors, in the English will, proved both wills in the Prerogative Court, and a bill was filed in the Court of Chancery in the name of five of the children (minors) named in the English will against the executors and Thomas and William, and also against Charles, the eighth child, (alleged to be out of the jurisdiction of the Court), praying an account of the English property, also of the French property, and that the rights of the parties might be declared.

Thomas and William in their answers, claimed, as the only children resident and domiciled in France, to be entitled by the laws of France "to become the only heirs of the testator's real property there, either under his will or as being such his heirs." They also stated their belief, "that by the laws of France all the personal estate in that country which the testator was possessed of or entitled to at his death—other than the said debt owing to him from the French government—on his death, devolved to all his children then living as well those residing in that kingdom as those residing out of France; and that the plaintiffs and all the other children of the testator, did, on his death, become entitled to his personal estate in France (other than the debt owing to him from the French government) in equal shares and proportions, and that the testator could not by those laws make any valid bequest of the same from his children, or of only some small portion thereof;" and submitted, "that by virtue of the testator's will, they, together with the testator's other children, became and are entitled in equal shares and proportions, as tenants in common, to his personal estate in England and the debt owing to him by the French government."

The *Vice Chancellor* referred it to the Master, to inquire whether, by the law of France, the testator could dispose of all, or any, and what part of his real estate there, by his will, and to whom? and whether by the law of France, the testator could dispose of all, or any, and what part of his personal estate there, by his will, and to whom?

Proceedings were also instituted in France: and, on the 28th of December, 1818, the Civil Tribunal at Dreux, (all the children being made parties,) made an order, setting forth the two wills, and directing that the accounts, liquidations, settlements, and distribution of the testator's estate should be made as required by the wills and testaments therein before described, in order to establish the equality directed by the testator.

On a petition to the Court of Chancery stating the proceedings in France, and praying that the Master upon the ground of such proceedings might divide the whole of the testator's estate, real and personal, amongst his eight children, a reference to the Master being ordered, he reported, on the 12th of February, 1822, all the proceedings in the French Court; "that it was a court of competent jurisdiction: and that the effect would be to make an equal distribution of the estate and effects, real and personal, of the testator, as well in England as in France, between the eight children of the testator."

It was an amicable suit, and was not argued; but by mutual arrangement, Sir Anthony Hart and Mr. Bell, counsel on either side, settled the minutes; and thereupon the *Vice Chancellor* made a final decree in conformity with the Master's Report, and declared, that regard being had to the laws of England and France, the testator's property, both real and personal, both in England and France, was divisible in equal shares between the children."

*In reply.*

No case has been adduced, and we can find none, where it has been held that a British subject can so far throw off his British character as to deprive himself of the rights he possessed under it; still less, that under whatever circumstances a British subject might take up his residence in a foreign country, he becomes domiciled so as to render it incompetent for him to dispose of his property according to the forms of the country of his birth. The facts, it is said, showing an adoption of the Portuguese character constitute a body of evidence not to be overthrown by any cursory intention: but intention is to govern such a case; and here is proof of an intention of preserving his British character. It is clear from the writers on the law of nations, that in order to constitute a complete change of domicile, there must be not only a primary change, but a wish to fix for ever: that there must be no intention to resort to the former country, but an intention to renounce it for ever. *Bruce v. Bruce* is said to establish the contrary; but there the party had abandoned Scotland by going to India expressly to make his fortune: he returned to England and resided there for two years without once visiting Scotland, and he then returned to India, and died. The question in *Bruce's* case was between two British domicils: here the point is, whether the deceased threw off his British character and all the rights belonging to it so far as to have adopted the law of the foreign country where he was domiciled. In such a case a more complete abandonment of his forum originis must be established. Had however the evidence of such abandonment been far more decisive, it is admitted that none of the cases cited are exactly in point; none establish that a British subject can so far change his domicile to a foreign country as to deprive himself of the privileges of a British subject, and render his property liable to the laws of the country in which he is domiciled. If such be the law, it is extraordinary that, notwithstanding the extended relations of England with foreign countries, no case can be found to that precise effect: those cited are only used as furnishing analogous principles. In *Marryatt v. Wilson* it was held, that a British subject might, from a foreign country, trade with the East Indies, which, as a British subject resident in England, he could not do. All that the case amounts to is, that while so resident he is not liable to penalties and forfeitures as if he were resident in England. So a British subject may reside in a neutral state and trade in innocent articles with the enemy of this country. No case goes further than this: and this will hardly induce the Court to hold, that even if the domicile were changed, and the deceased had divested himself of the rights of a British subject, a will, not drawn up according to the laws of Portugal, is invalid, the deceased taking upon himself the disposition of his property in England by a will not purporting to be made according to such Portuguese law, but good and valid according to the law of England.

*Hunter v. Potts*; *Sill v. Worswick*; and *Philips v. Hunter*, are cases of bankruptcy; and argued on special verdicts. *Sill v. Worswick*, 1 H. Bl. 689, was a transaction, in which the bankrupt and the other parties were not only British subjects, but resident in England; the bankrupt having property in St. Christopher's, where the bankrupt laws did not prevail; and Lord Loughborough said, "it was a question, whether a creditor resident in England and subject to the laws of England, should avail himself of a proceeding of that law to get possession of a debt from those entitled to it for the benefit of all the creditors, and to hold

that possession against those creditors:" he decided, that the bankrupt law bound a British subject, and that a creditor was not entitled to hold against the assignees of a bankrupt in such a case. Lord Loughborough also said,—“I do not wish it to be understood that it follows as a consequence from the opinion I am now giving, I rather think the contrary would be the consequence of the reasoning I am now using—that a creditor in that country, not subject to the bankrupt laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt.” He is here arguing on the case of *Solomons v. Ross*: “it by no means follows that a commission of bankruptcy has an operation in another country against the laws of that country.” Lord Loughborough does not say, that if the law of the foreign country enabled a creditor to obtain his debt there, that the law of England would compel him to refund it: “If he had received it in an adverse suit with the assignees he would clearly not be liable; but if the law of that country preferred him to the assignee, I do not think my holding a contrary opinion would revoke the determination of that country.” But the argument on the other side would go to the length, that there would be jurisdiction here to make even a foreign creditor refund. *Hunter v. Potts* is to the same effect: and in *Sill v. Worswick*, there was no question of domicil. *Brodie v. Barry*, and the other cases may show that, to a certain extent mobilia sequuntur personam, but not that in all cases and under all circumstances,—contrary to the express will of the testator—the *lex domicilii* is to prevail. In *Ryan v. Ryan*, the question of domicil was not material; for an individual not domiciled in, but merely passing through a country, and marrying there, is *prima facie*, as to such marriage, governed by that law every where; therefore the Danish marriage celebrated there on the dissolution, by a sentence of a Danish Court, of the former marriage, also celebrated there (a), was to be presumed valid for the mere purposes of administration, the Court carefully guarding itself from expressing any opinion that the proofs would have been sufficient in a matrimonial suit. It was also ultimately an unopposed case. To establish the position on the other side, the Court must have held, that an English marriage between British subjects could be legally dissolved by a Court in Denmark, the parties having become domiciled there. The cases in 6 Bro. P. C. were only cited, as showing that those cases have been argued on principles which would apply to testacy. *Hog v. Lashley* is principally relied on; but the Court is in the dark as to the decision in that case. It cannot, then, go the length of saying, that the *lex domicilii* applies to testacy as well as to intestacy: and, unless it holds that such must be the rule in all cases, and under all circumstances, it could not apply to the present case, in opposition to the clear ascertained intentions of the deceased, more especially as it is specially provided by the treaty of commerce and navigation concluded between England and Portugal in 1810, that British subjects resident in Portugal shall be allowed to dispose of their property by testamentary instruments (b).

(a) The original papers show that such was the fact.

(b) Sect. 7 of that treaty provides; “that the subjects of each shall have a free and unquestionable right to travel, and reside within the territories and dominions of the other; to occupy houses and warehouses, and to dispose of personal property of every sort and denomination, by sales, donation, exchange, or testament, or in any other manner whatsoever, without the smallest impediment.”



As to Mr. Waddington's case, it was not contested; there was only one solicitor employed. That case, however, though cited on the other side, is much stronger the other way. The testator's object was to divide his property in England and France, by wills executed according to the forms of those countries respectively, in the same manner as Mr. Stanley has divided his property in Portugal and England (a).

#### JUDGMENT.

SIR JOHN NICHOLL.

This case involves a question of law of considerable importance; but upon the facts there is little, if any, controversy. In order to arrive at the question of law with accuracy it will be convenient to set forth the facts out of which it arises. The case respects the validity of the will and four codicils of John Stanley, or rather of two of the codicils, for it is now admitted that the will and the other two codicils are entitled to probate.

The testator, a native of Ireland, went in 1770 to Lisbon, and there engaged in business as a merchant; soon afterwards he married a lady, a Portuguese by birth, though of Irish parents, and a Roman Catholic. In order to contract that marriage he professed the Roman Catholic religion. In 1798 he obtained letters of naturalization as a Portuguese subject, and in 1808, when the French were in possession of Portugal, it is alleged that he was treated as a Portuguese subject: that is denied; and it is, on the other side, alleged, that he was treated as a British subject. The manner, however, in which the French treated him is not very material to the decision of this case. Before their arrival he had placed a large part of his property in his son's name, who was born in Portugal; but, the will recites, that it was "a fictitious measure as a security against the French." The testator had four children by his wife, but only the present party survived him. His wife having become insane was removed from Portugal to Ireland, where the connections of both resided: she was there supported by an allowance paid out of the property of the deceased, placed, as already mentioned, in the possession of the son. The deceased, in 1808, remove from Lisbon to Madeira and continued to reside in that island till his death in 1826: he had a natural son, a legatee in the will and codicil, the other party in this cause. This son was married; and at the time of the deceased's death had five children, whom, as his grand-children, the deceased has benefited by some of the testamentary instruments in question.

This is a brief history of the deceased and his family, so far as it seems necessary to mark out the question to be decided: but it may be proper also here to describe the testamentary acts of the deceased. The will and four codicils are propounded by the natural son, as a legatee, the executors having renounced; and they are opposed by the legitimate son, the residuary legatee in the will. The will and first two codicils are executed in the forms required by the Portuguese law: the third and fourth codicils are not in that form.

At first Mr. Stanley opposed all the papers, for it was contended, that by the Portuguese law a person marrying and making no settlement, and leaving a widow and issue of the marriage, could only dispose of one-

(a) *Argentrie de la Coutume de Bretagne*, Art. 449. 499. *Dictionnaire de Droit Canonique* (par Maillare), Tome 2. p. 220. Judgment, &c. in *Odwin v. Forbes*, reported by Henry, and Appendix, p. 193. *Morah v. Hutchinson*, 2 B. and P. 226, were cited in addition to the cases and authorities collected in *Munroe v. Douglass*, 5 Madd. 379.

sixth of the property he left behind him, as half belonged to the widow, and two-thirds of the other moiety to the issue; and further, that an attempt either to dispose of more than one-sixth, or to dispose of that one-sixth, as by this will, in favour of adulterine issue, rendered the whole invalid. It is now admitted, that the proof of the Portuguese law to the extent of rendering the papers void in toto has failed, and that the will and first two codicils are valid so as to dispose of not more than one-sixth of the whole property; and that of them probate must be granted. The opposition is therefore now confined to the third and fourth codicils, which are not executed in the Portuguese forms, though they are sufficiently executed according to the forms required by the law of England for an English will.

The will, dated at Funchal on the 21st June, 1820, gives to the natural son and his children legacies to a considerable amount; the first codicil, dated on the 4th July, 1820, gives some further legacies to the grand-children, and appoints an additional executor; the second codicil is dated on the 11th of July, 1820, and gives a further legacy to the natural son and the aunt. The factum of these instruments being in the Portuguese form is admitted, and their validity, at least as to one-sixth of the property, is not denied: they in the strongest manner mark the wishes and intentions of the testator, and the grounds on which those wishes and intentions were formed in favour of the natural son and the grand-children.

The two remaining codicils are those which are contested—the third, dated in October, 1820, merely relates to the substitution of some of the executors. The fourth codicil is the material instrument: its object is to make a further provision for the grand children: it refers to certain donations made to be invested in trust in the British funds for their benefit, and then gives his property in the British funds in their favour. Both these codicils are in the deceased's own hand writing and are attested by three witnesses; there is no doubt of the factum nor of the intention, nor is there any doubt that they are valid, if to be considered with reference to English forms. They dispose of property in the English funds and of no other, and consequently are to operate and be executed in England, but they are not executed in the form required by the Portuguese law for Portuguese testamentary acts; and the question is, whether on that account they are utterly invalid so that probate of them ought not to be granted by this Court.

In opposition to their validity it is contended, that the deceased was domiciled in Portugal and is to be considered as a Portuguese subject; that domicile is governed by residence; that here was a continued residence for above fifty years confirmed by change of religion, by marriage, and by naturalization; that *mobilia sequuntur personam*, that not only in case of intestacy is the succession to moveable property governed by the law of the country where the person is domiciled, but that such property can only be disposed of by a will made in the form required by that law—by the *lex domicilii*.

On the other hand, that the deceased, was not at his death a domiciled Portuguese subject; that it is not residence but intention which ascertains domicile; that the domicile or origin continues so long as there is an intention of returning to it; that the deceased reverted to the Protestant religion, sent his wife to England when by her malady the con-

sortium was broken, invested his property in England, intended to return to England, and was only prevented by infirmity and death, desired to be buried in the English burial-ground, and was during his life and at his death considered and treated as a British subject: but, secondly, if he were domiciled in Portugal, still he maintained the right of a British subject to dispose of his property by will made in the English form: that the secession to personal property depends upon the intention of the possessor, whether expressed or only implied; that if in cases of intestacy an intention is implied that the property shall go according to the law of the place of residence (though even that is not admitted so far as respects a natural born British subject residing in a foreign country), yet where a different intention is declared by will, that will, if validly made according to the English forms, is valid as to property in England.

Such was the general substance of the arguments on both sides, and in support of each proposition various authorities and cases were referred to.

The law of domicil, and the succession to personal property as affected by it, has been a vexata questio. The authorities applying to it are collected in various reports, particularly in 6 Bro. P. C. and in Lord *Somerville's Case*, 5th Ves. 750. These authorities were not only referred to, but very elaborately discussed on both sides in the argument in the present case: for that reason, and because it is admitted that no adjudged case comes directly up to the present question, it is unnecessary again to quote and discuss them. I shall therefore content myself with stating the principles which may be deduced from them so far as they may be applicable to the point now brought before me for decision.

The general rule, that mobilia sequuntur personam, need not be controverted, though that rule, or rather fiction, if without exception, would in some extreme cases lead to absurdity and injustice, more especially in the modern state of society, and with reference to the nature and extent in these times of personal property, particularly funded property. The rule took its rise when "mobilia," for the most part, did accompany the person; but still recognising the rule, it is necessary to ascertain the national character of the "persona;" for it would be carrying the fiction into manifest absurdity to hold, that the person and his mobilia changed their character with every place which he might enter, or pass through, or move to.

The general and primary rule is, that the national character of the person is acquired from the place of birth, though some exceptions even to that rule have been framed, not by the common law, but by special acts of parliament; as for instance, in favour of persons born abroad, but of natural born British parents. The different species of character is distinguishable; one is natural, the other local; one is temporary, the other permanent. The native national character is not only the most strongly impressed, but for some purposes cannot be changed: "nemo potest exuere patriam" is a rule of the *jus gentium* held by most countries, and by none more strictly than by this country. A natural born British subject cannot, at his own will and pleasure, divest himself of his native duties; nor can he be deprived of his native privileges except for crime: he may go into other countries and acquire privileges there, but still his native rights and duties adhere to him. These principles are, I apprehend, correctly laid down by Mr. Justice Blackstone: "it is

a principle of universal law, that the natural born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for his natural allegiance was intrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrence of that prince to whom it was first due." "This allegiance is the duty of all the king's subjects . . . . . their rights are also distinguishable by the same criterions of time and locality, natural born subjects having a great variety of rights, which they can never forfeit by any distance of place or time, but only by their own misbehaviour." 1 Bl. Com. 370-1.

For certain purposes a man takes his character, *prima facie*, from the place where he is domiciled, and, *prima facie*, he is domiciled where he is resident, and the force of residence, as evidence of domicile, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not conclusive; for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years, be conclusive? As a criterion, therefore, to ascertain domicile, another principle is laid down by the authorities quoted as well as by practice,—it depends upon the intention, upon the *quo animo*—that is the true basis and foundation of domicile; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*: a temporary residence for the purposes of health, or travel, or business has not the effect: it must be a fixed and permanent residence, abandoning finally and for ever the domicile of origin; yet liable still to a subsequent change of intention.

"The third rule I shall extract," said the Master of the Rolls, in the *Case of Somerville*, 5 Ves. 787, "is, that the domicile of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile;" and that observation was made even with reference to domicile in different parts of the British dominions, when the choice was perfectly free from any restriction of conflicting duties.

In the present case there is strong evidence of acquiring a new domicile, and an intention of abandoning his former and taking another as his sole domicile, (but still, it must be remembered, in a foreign state) declared not merely by long residence, but by marriage, naturalization, and investing himself with all the privileges which a new comer could acquire at his place of residence. But on the other hand here is some evidence to show a change of intention, and of the *animus revertendi*, not merely that latent intention which pretty generally exists as a sort of natural feeling of "panting for his native home," but shown by acts done and by declarations made, by sending his wife to England, by investing property in the English funds, by declaring his adherence to the English Church, by desiring, if he should chance to die at Madeira, to be buried in the English burial-ground, by making these codicils in the English forms, by declarations to several of his friends of his wish and intention to return, and of his fears that he might be prevented by infirmities.

In questions of national character it has been often decided, that character acquired by mere residence ceases with the residence, and that the original character reverts and is reacquired much more readily than the change is made from an original to an acquired character; the

local and temporary character is by circumstances more easily presumed to be abandoned than the natural and more permanent character, which in some respects at least is inalienable: the *animus revertendi* actually put in motion, though the removal has not been consummated, recovers the original character. Whether the circumstances adverted to would be sufficient to shake off the Portuguese character in the deceased's case, or to exempt his property in Portugal from the operation of the laws of that country, may not be necessary to be decided: but there are circumstances tending to show that the deceased neither wished nor intended altogether and for ever to abandon his connexion with his native country, nor to give up the rights and privileges belonging to him as a British subject. Not only in common parlance would he still be described as an Englishman, and not a Portuguese, but he himself was in *animo* and he was in some respects *de jure* still an Englishman. His intention to retain his right as a British subject of disposing by will of his property in the British funds is quite obvious: and to deprive him of that right the law ought to be clear and unequivocal: and for this reason because it will operate as a disqualification and a forfeiture of right.

That he retained some rights acquired by birth cannot be doubted: he would succeed to real property—he might purchase real property, notwithstanding all that had taken place in Portugal. Over personally here, even a foreigner domiciled in his native country might in *his life time* exercise dominion as freely and as fully as a resident Englishman. So while the deceased survived, his power over and his rights regarding personal property here—with some few exceptions perhaps, e. g. in case of bankruptcy—would not, at least in this country, be affected by his domicile abroad, they would be regulated by the laws of England and not by the law of Portugal. He would succeed in distribution of personal property in England as a next of kin, under whatever legal disabilities the law of Portugal might place him,—he could transfer or give away personal property without regard to any restrictions which the law of Portugal might impose on such transfers or gifts:—he could do this, it should seem, by instruments in the British form: the Bank would probably receive no other in order to transfer stock: and he could engage in contracts to be executed in England, though such contracts might be illegal or invalid by the law of Portugal.

It comes then to the question, whether a *testamentary* act of a British born subject, clearly intended and wished to operate upon his personal property in England, and executed according and with direct reference to the forms of the English law, which in this respect coincides with the law of nations—the *jus gentium*—is by the law of England invalid, solely because the deceased had long resided and was domiciled in Portugal, and because such testamentary act was not executed in the Portuguese forms. The authorities quoted all tend to prove that the *jus gentium*—the general law of all countries—is favourable and inclines to give effect to testamentary dispositions. They also establish, that intention is the very basis and foundation of the testamentary disposition to which effect is thus to be given. Forms are prescribed only for the sake of rendering more secure the execution of the real intention. The policy of some countries may be to impose restrictions on the disposition of real property, or sometimes even on the disposition of personal property by requiring the whole or a certain portion to descend to the wife and children for whom every person is under a moral duty to provide; but

wherever the power of disposing exists and to whatever extent it exists, the intention and not the form, more especially as regards personal property, is the governing principle.

Assuming, then, that the deceased was a British subject, yet at the time of his death domiciled in Portugal, and that he had a clear intention to dispose of his property in the British funds by this codicil, in his own hand-writing, and attested by three witnesses, is it invalid because it was not attested by a notary and five witnesses as the Portuguese law requires, or is it entitled to probate here? Among the numerous authorities quoted it is admitted that there is no adjudged case in which the question has been decided either way: no case in which a will made with reference to, and in accordance with, the English forms by a British subject domiciled in a foreign country has been refused probate: no case in which the property of a British subject dying even intestate in a foreign country has been held distributable according to the law of such foreign country. All the adjudged cases have been of persons dying domiciled in some part of the British dominions, having different rules of distribution. No case has yet gone farther than to adopt the *lex domicilii*, when the domicil was in some part of the British dominions, and when it was a case as to the distribution of the effects, or the construction of the instrument, not as to the right to the representation or the validity of the will.

The question is of too great importance, more especially in modern times and in the present state of society, to be decided on mere obiter dicta, or assumptions in argument. Great numbers of persons particularly of this country reside abroad, some for sufficient reasons, some perhaps upon less favourable grounds: they have no idea that their property would be distributable according to a foreign law, still less that they are deprived of the privilege of disposing of their property by will made in the same form as if they were resident in England. A person in the decline of life or of health, going abroad to a more genial climate in hopes of prolonging life, or at least of rendering its remaining period less painful or more comfortable, without any hope or intention of ever returning, leaving the *summa rerum* in England—perhaps exclusively in the funds—having merely the dividends remitted to him for his subsistence; knowing that the law of England would distribute this property exactly as he would wish, and on that account, or from mere indolence, making no will, or supposing that a will in his own handwriting would be valid; how alarming would it be to a person thus circumstanced, how injurious to his family, if on establishing himself in the south of France he is to be bound by the law of that country: he may then be recommended to go farther south into Italy, then into Sicily, then perhaps to Maderia—with the intention at each place of fixing himself for the remainder of his life—"of abandoning his former domicil and taking the other as his sole domicil,"—at each remove a different law may govern not merely the form of the instrument, but the power of disposing,—he may retain the *jus disponendi* over only one-sixth part of his property; an undeserving wife or undutiful children may be absolute proprietors of five-sixths of the personal property which he had left in England. If this *lex domicilii* is to be the rule not only in cases of intestacy, where they may be some presumed intention, but even in the case of a will as respects not only the form of the instrument, but even the power of disposing against the manifest and declared intention, it will be going beyond the authority

of any case hitherto decided. It is true that there has been found no decision in a contested case that such a will is valid; but there have been instances where probates of such wills have passed sub silentio in common form. The case must surely have frequently happened, and if the probate was not opposed, the inference rather is that the will was supposed to be valid.

What then is the Court called upon by the opposer of the codicil to decide? That the codicil is invalid contrary to the manifest intention of the testator—that intention being expressed in an instrument duly executed according and with reference to the law of this country, in his own handwriting, and attested by three witnesses. The Court is called upon to extend disqualification and to deprive of privilege—to disqualify a British subject because he is resident in a foreign country from giving effect to his wishes in the disposition of his property at his death, and to deprive him of his testamentary privilege which is so highly favoured by the general law of this and of most other countries. Without some more direct authority than any which has been quoted, or with which this Court is acquainted, I do not feel warranted to proceed to such a length. I am the less disposed so to do, because in one way the decision of the Court of Probate would be conclusive, in the other it would not. If the codicil be pronounced against and probate be refused, the legatee could not resort to any other jurisdiction; if pronounced for, this Court would merely decide on the factum, and the residuary legatee might resort to a Court of Equity to take its decision upon the question of construction.

There has been a recent case, not quoted in the argument, where a Court of Equity has held, that in the construction of a will the *lex domicilii* is to rule, unless there be sufficient to show a different intention in the testator. *Anstruther v. Chalmers*, 2 Simons, 1. The facts of the case were: Miss Anstruther, a native of Scotland, was domiciled in England. On a visit to Edinburgh, in 1814, she made a will entirely in the Scotch form, and it was deposited with the writer at Edinburgh: she had personalty in England only, and died in England. Scotland then was the *forum originis* and *forum contractus*, but on the other hand England was the *forum domicilii*, and the *locus rei sitæ*. The question was, whether by the legatee's death in the life time of the testatrix a legacy lapsed according to the law of England, or survived to the legatee's representatives according to the law of Scotland. The point put in argument on both sides is the intention—what was the rule of construction the testatrix intended should be applied to the instrument. The Court decided that being domiciled in England, it was to be presumed that she intended the law of England to be applied: there was not enough to repel that presumption. In the present case there is sufficient clearly to prove that Mr. Stanley's intention was to make these codicils in the form of the law of England. In *Anstruther v. Chalmers*, it is true, words might have been used which even according to the law of England would have prevented a lapse. The case therefore does not infer that intention could have given effect to a bequest forbidden by the law of the domicile; but it shows that in order to determine what law ought to operate on testamentary instruments, all Courts primarily and principally look to the intention of the deceased.

Another case which has not been reported, was quoted in argument by Mr. Stanley's counsel from instructions furnished him, and a counter statement was afterwards given on the other side. The Court, without

in the least doubting the intended correctness of the statements, is always cautious of relying upon an authority of that description: and in this instance the precise grounds of decision are at last left very much in the dark. The case referred to was that of Mr. Waddington,—a natural-born British subject,—long resident and settled in France, and domiciled there at his death: he made two wills, one in the French form disposing of his property in France, and one in the English form disposing of his property in England. So far the cases are parallel: there is nothing to show that the English will was in point of form made also conformably to the French law; the contrary is to be inferred. How does the case operate further as a precedent? It should seem in favour of the validity of these codicils. Both wills receive the probate of this Court: as far as that goes it is a precedent in favour of Bernes the legatee. Both wills are considered in the Court of Chancery, and also in the French Court, and are acted upon as valid wills, for the property passes according to the disposition contained in the two wills taken together,—the French will and the English will. The intention of the testator was to divide all his property equally between his children, and both Courts decide so as to give effect to that intention. Again, therefore, it is a precedent in support of the principle, that intention is to govern the testamentary disposition;—and how is the final decree made? Not upon the ground that the French court, or the law of France, was on account of the deceased's domicile the sole forum having the right to decide—not excluding the law of England, nor pronouncing against the validity of the English will made in the English form, but the Vice-Chancellor is made to declare, “and declared, that regard being had to the laws of England and France,” the testator's property both real and personal, both in England and France, was divisible in equal shares between the deceased's children. He does not declare that the deceased having been domiciled in France, the French law was exclusively to govern his will; he does not declare that the French tribunal having so decided that both wills are valid, a Court of Equity will merely on that ground decree the property to be divided into equal shares, but both wills are proved in England and in France; both are considered valid in both countries—notwithstanding that one was in the French form, the other in the English—and regard being had to the laws of England and of France, the intention of the testator, collected out of both the wills combined together, is carried into effect. Whether the Court from these statements rightly understands Mr. Waddington's case, may be doubtful; but at all events it serves so far as a precedent that probate was taken of both wills in this Court. That will be the effect of the Decree about to be made by the Court, which is to pronounce for the will and codicils, and to direct probate to be taken of them all.

Costs out of the estate.

AN APPEAL from this decree was interposed to THE HIGH COURT OF DELEGATES.

The Judges, who sat under the Commission, were:—

*Parke, J. (K. B.)*  
*Bolland, B.*  
*Bosanquet, J.*

*Burnaby,*  
*Daubeny,*  
*Chapman,*  
*Curteis,* } LL.D.



The præsertim of the appeal was:—"and more especially from that part of the decree wherein the Judge pronounced for the 3d and 4th codicils, bearing date the 24th of October, 1822, and 29th of October, 1825." Accordingly the Proctor for Stanley prayed the Judges to pronounce against the 3d and 4th codicils;—the Proctor for Bernes—to affirm the decree with costs.

The *King's Advocate*, *Dr. Phillimore*, and *Mr. Alderson*, for the Respondents.

The deceased's residence in Portugal was solely as a merchant. The use of his native language, the niceties of which he had forgotten in the disposition of his property, tends to show that he did not consider himself a Portuguese subject. Had he so considered himself, he would probably have adopted the language of his domicile. He was as much domiciled in Portugal for the last twenty as for the last six years: could he not during that period have disposed of this property by an English instrument, e. g. a power of attorney for the sale of stock? It does in fact appear from his will, that he did make transfers of his stock, thus clearly exercising dominion over and dealing with it as his own. For these transfers an instrument in the Portuguese form would not have been valid. Why is death to make all the difference? In order to the validity of a testament, no form is prescribed nor restraint imposed by the conventional law of Christendom. By the law of nations, intention is the governing principle of a Court of Probate. The doctrine of the law of England is, that a testator may dispose of his personal property, quocunque modo velit, quocunque modo possit. The other side must show that he is deprived of this privilege. From Mr. Veitch's evidence it appears the Portuguese authorities never doubted that these were legal codicils. If Mr. Stanley had executed these codicils in the Portuguese forms he might be presumed to have intended that the disposition should be according to the Portuguese law; but here he in effect says, "I know it is necessary to adopt the Portuguese forms when disposing of my property in Portugal, but when I come to my English property, I know I am a British subject entitled to all the privileges of a British subject, that I am so considered by the Portuguese government, that my will is deposited with the British Consul, and expressed in my own language, and I shall execute these codicils disposing of my property in England according to the forms of the English law."

The question is not whether the law of Portugal shall ultimately prevail or the law of England, but whether a Court of Probate in England is to look into the document for the purpose of ascertaining what law is to be applied to it,—to see what is the intention of the testator, and whether that intention is conformable to the power of the testator under the law of Portugal. The construction of the will, if admitted to probate, belongs to the Court of Chancery, and it may become a question whether it is to be construed by the law of Portugal or of England; but that is a different point from the mode of execution. Cases of intestacy involve both points. Both by the law of England and of Portugal the deceased had the right to make a will: has he made one? The *jus gentium* refers the form of the instrument to the place where it is to be carried into effect—that is England; but how and where is it to be proved? By the law of the country and in the place where the property lies: and the law of that country is to inquire (if there be proof that the party intending to give the property) whether it is given with certain forma-

lities,—these formalities being either those which the law imposes, or which the deceased has imposed on himself. The former, that the will must be in writing, have been complied with: and so, as we contend, have been the latter, because he did not impose on himself the formalities required by the law of Portugal, but an attestation by three witnesses. A different mode of probation may be required in the Portuguese courts and in these courts: the will, if requiring probate there, would be admitted to proof according to the mode of probation there required. If by the Portuguese law the deceased could have made no will, the case might be different.

The only question is, whether this will can be given in evidence. A similar question arose in *Brodie v. Barry*. Sir W. Grant, remarking on the decisions that the question, whether a will should be read against an heir, belonged to the law of real property, says, "Upon that principle if the domicile were in Scotland and the real estate in England, an English will imperfectly executed ought not to be read in Scotland for the purpose of putting the heir to an election, and upon the same principle if by the law of Scotland no will could be read against the heir, it would follow that a will of land situated in Scotland ought not to be read in England to put the Scotch heir to an election." He doubts, as well he might, the soundness of the principle, and finally the will was read. Probate has never been refused in such a case.—What is the principle on which the probate proceeds? By the law of the land it is vested in the Ordinary, and if granted it must be on some act of which testimony can be given. If by the law of the land the Ordinary is to grant probate when he is satisfied a will has been made in England, it is strange that he should not do the same upon evidence that a will has been made elsewhere either according to the law of the country where made or to the law of England. If proof be given that a will has been admitted to probate in the country where made, your Lordships must admit it to probate here; but if it be tendered for proof originally here, you must examine it by the law of England, for you have not the means of ascertaining whether it has or has not been tendered for probate where executed. In Waddington's case the will of an Englishman domiciled in France, made in the English forms and not conformable to the law of France, was admitted to probate; both wills were held valid, and the intention carried into effect. The circumstances of the present case are new. You have now, as a Court of Probate, for the first time to decide a question where the decision against the validity of the papers must be final so as to proclude the party from going to a Court of construction; while, if you pronounce for the validity, the party may resort to the judgment of a Court of Equity. There must have been hundreds of cases of probates of wills granted under the same circumstances as the present, of wills executed in Portugal where the property was in England, yet not one can be cited in which the testator has been held not to be at liberty to dispose of his personal estate in England by a will conformable to the laws of his own country. The absence of such a case affords a presumption that such a will is not contrary to law. All the cases decided are where it was necessary to determine on the effect of the will: here the question is with what species of evidence the Ecclesiastical Court shall be satisfied; and whether it is to be satisfied on its own rules. We can find no instance where a will capable of proof by the law of England has been refused probate. As this question is only whether the instrument shall be ad-

mitted to probate, your Lordships will affirm the judgment, and leave the construction to a Court of Equity.

*Dr. Lushington, Dr. Addams, and Mr. Follett, for the Appellants.*

Lord Coke's maxim, Co. Litt. 198, *Nemo potest exuere patriam*, has nothing to do with the case. Though a man cannot throw off his allegiance, he may owe a double allegiance, 1 Hale's P. C. 68, and he can acquire a new home. There is no maxim in the English law that an Englishman cannot throw off his domicile of origin and acquire one in any part of the world. There is nothing laid down which confines the change to different parts of the English dominions, for Scotland is as much a foreign country as to its law as France or Portugal; it is only the same country as to its king and legislature. There is no difference then in changing to Scotland or Jersey, or to any foreign country; nor was any such distinction ever adverted to by any Court till thrown out in *Curling v. Thornton*, 2 Add. 6. If there had been a constant intention of returning, and if the connexions and family of the deceased had been in England, the domicile of origin might have adhered; but he had done all he could to put off his original character; he set up "his tabernacle" in Portugal. He had no earthly connexions in England. The sole persons interested in this question are Portuguese subjects.

*Per Curiam.*—Mr. John Stanley, the party in the cause, is a British subject; he was born before the act of naturalization.

*Argument resumed.*—Legally he is so, but practically he is a Portuguese. There is no proof that the deceased sent his wife to Ireland: the will only says, "she went there." No English witness speaks to his declarations of his intentions to return; if he had such intention, is it not strange that he should not have so expressed himself to his own fellow subjects! But Lord Thurlow, in *Bruce v. Bruce*, expressly said, "that an intention to return will not do." The will itself proves that he doubts his right to dispose of his property as a British subject. In referring to the possibility of his son opposing the will, he does not say, I am not a subject of Portugal, nor does he assert his right as a British subject: he hangs a penalty in terrorem over his son. The will is not confined to Portuguese property, but disposes also of English, American, and other effects.

The fact of the codicils being executed in the English form, whether used as an argument to show his intention of returning or for their validity, amounts to nothing. It is said, it was his intention not to adopt the Portuguese forms: it was his intention to pass his property in England, and the question is, could he do so in the way he has adopted? If intention alone is to have effect there would be no need of any form: but the law of all countries requires that the intention should be expressed so that the law may understand it, and that the personal property may be distributed according to its rules. If it be a clear principle of law that personal property has no locality; that the law of the place is not to be looked to at all, it follows as a necessary deduction, that the case of a party dying, leaving a will, must be liable to the same rules as in a case of intestacy. The law which binds the person governs the effects. If, then, the person of the testator was governed by the law of Portugal, so must these instruments,—if the property is distributable by the law of Portugal, the instrument should be valid by that law. If intestate, it is conceded, that his property, in whatever country, would pass according to the Portuguese law: how, then, are we to find whether he is in-

testate or not. If the will by the Portuguese law is invalid, he is intestate in Portugal; for you can never say, that because this will is valid in England, it is therefore valid in Portugal. Supposing it to be valid by every other law, but invalid by the law of Portugal, then the property would go according to the Portuguese law, as in a case of intestacy. Suppose a will, giving, without specification, all the testator's property in different places; by the law of what country are you to see that the will is valid? It is necessary to look to that point; for the deceased may be testate in one country, and intestate in another: we contend, that, on principle, if it be once established that in cases of intestacy, the law of domicil is to prevail, it must follow, that in testacy, it must also; otherwise, you cannot find out—whether the party be testate or not. If a foreigner made a will,—valid by the law of his own country, and invalid here,—disposing of property in this country, could the Court refuse probate? When an instrument is invalid the Court of Probate refuses probate; it does not grant probate and send the paper to the Court of construction: so if the codicils in this case are to be governed by the Portuguese law, you cannot send the instruments to a Court of construction that it may have a construction contrary to the rules of a Court of Probate. The same law must prevail as to the probate and construction, otherwise persons as executors will obtain control over the property to which they have no right, and the probate would be conclusive evidence of their right unless a Court of Equity interfered.

From Waddington's case no principle can be extracted; it is not reported; it was arranged by consent of parties; the decree was settled by counsel and confirmed by the Vice Chancellor. The case of *Gordon v. Brown*, House of Lords, 1st of March, 1830, establishes that a British subject may acquire a foreign domicil in complete derogation of his British, and that then his will must be construed by the law of that domicil (a). The Judge of the Prerogative in speaking of the

(a) *Gordon, Trustee of John Brown, v. Mary Brown.*

This was an appeal from certain interlocutors of the Lord Ordinary and first division of the Court of Session in Scotland. Wm. Brown, by birth a Scotsman but domiciled in Virginia (so described in the Lord Chancellor's judgment), died in 1811 at Richmond in America, having on the 29th of June 1805 made his will in Virginia, which will was proved by the executors, in the proper Court in Virginia, in February 1812, and administration with this will annexed was also granted by the Prerogative Court of Canterbury to his father and mother. The will commences, "I William Brown of Lynchburgh, state of Virginia, do make this my last will and testament." After giving to certain persons (all Scotch) legacies "in Virginia Currency and an acre of land at Lynchburgh," it proceeds: "to my father and mother James and Margaret Brown, of Kirkcudbright, N. B., I leave one 4th share of the balance of my estate to them or the survivor of them; to my sister, Jean Muir, of Kirkcudbright, N. B., I leave one 4th share of the balance of my estate, at her death to be equally divided between her children. To my sister Isabella Black, do. To my sister Mary Brown, I leave the remaining one 4th share of the balance of my estate, at her death to be equally divided between her children *should she have any.*" It then appoints three executors, two described as resident in Virginia and one in Scotland, and concludes: "Witness my hand and seal at Lynchburgh this 29th of June 1805."

Test G. P.—T. M.

WILLIAM BROWN. (L. S.)

It appears that the testator at the time of his death was in partnership with Mr. Boyd Miller in London, and although by far the greater part of his property was in America, he had also funds in England: but it does not appear that he had either real or personal estate in Scotland.

After the death of the testator, a suit was instituted in the Virginia Court of Chancery by Mary Brown (the respondent) and Jean Muir, as residuary legatees in the will, against the executors and legatees. In May 1816 a decree was pronounced, that payment of the shares of Jean Muir and Isabella Black, both having children, ought not to be made unless security be given that at their respective deaths their shares should be divided among their children, as provided by the will; that the executors pay to Mary Brown one 4th of the testator's residuary estate, and to the husband of the other two sisters their respective shares on giving bond in 70,000 dollars, that at the death of their wives their legacies shall be divided amongst their children.

alarm that persons abroad would feel if the law we contend for prevail, seems to have understood us to argue that the validity of wills was to be

In October 1816, Mary Brown, by power of attorney, authorised John Brown to receive on her account the money that she should be entitled to under the will of the testator; and in conformity with the decree the money was paid to him as her attorney. "It seems therefore," said Lord Chancellor Lyndhurst, "extremely difficult to say that Mary Brown is not under these circumstances entitled to an account against John Brown for the money he has so received under a power of attorney from her and in pursuance of a decree of a competent court in America pronounced upon the subject of this will in a suit instituted for that purpose. It is said however on the part of the appellants that Mary Brown was entitled to a life interest in this property; and that she being entitled only to a life interest, the residue was undisposed of and would pass therefore to the father, and from him by virtue of certain deeds to John Brown. For the purpose of establishing that this was the true construction of the will, the opinion of an English lawyer was offered in evidence, but the Court in Scotland justly observed that they had nothing to do with the law of England, and that there was no evidence to show that the law of Virginia corresponded with the law of England in respect to the rules by which an instrument of that kind was to be construed."

"A petition was presented that the opinions of Virginia lawyers might be taken for the purpose of guiding the consideration of the case. The Court however, rightly I think under the circumstances, rejected the petition. [See *infra*.] The Court of Virginia had in effect in 1816, pronounced a judgment on the construction of the will, for they had decreed that Mary Brown was entitled absolutely to this property; they had directed this property to be paid to her, and it was accordingly paid to John Brown as her agent appointed by her to receive that to which she was entitled under the will. It seemed therefore under these circumstances and after so long an interval of time not right again to postpone the cause for the purpose of taking further evidence as to the real and proper construction of the will. It was urged however that John Brown ought not to be bound by that decision; he was a party to that suit, his name was upon the record, but the decree was pronounced during his absence in Scotland. Although sitting here your Lordships cannot be apprised precisely of what the law of America is in this respect, yet it is probable that the decree having been made in his absence, he might have obtained a rehearing. It is not however suggested that he was not apprised of the decree at the time it was pronounced in 1816: he had received from the executor the money under the decree, he had taken no steps from 1816 for ten years to call that decree in question, and therefore I think the Court below rightly judged that they might take that decree as the foundation of this judgment, and decide accordingly (\*)."

Judgment of the Court of Session affirmed.

The interlocutor of the Lord Ordinary, Lord Eldin, finds, "if the opinion of any foreign lawyer were necessary or useful, the opinion of an American lawyer, as best acquainted with the American law, ought to be taken; that from the nature of William Brown's settlement, which is very simple and clear, the construction put upon it by the respondents is apparently ill founded; and that it has been asserted that the settlement was regularly brought before an American Court which gave judgment in Mary's favour, and that no sufficient answer has been made to that assertion."

The interlocutor of the Lord Ordinary, Lord Alloway, finds, "that by the plain import and meaning of the words of the testament, as well as by the judgment of the competent Court in Virginia, where the testator died, and which stands unchallenged and unaltered, the fee of the legacy is vested in Mary Brown, who by assent of both parties, is long past the period of having children: that the construction of this American will cannot be affected by the opinion of any English counsel, as it must be judged of solely by the laws of America; that Gordon, &c., as representative of Brown, is accountable for sums drawn by him as attorney of Mary in virtue of this American settlement."

#### NOTES OF JUDGMENT IN THE SECOND DIVISION OF THE COURT OF SESSION.

*Lord Justice Clerk.*—Had there been no proceeding in America, the proper course would have been to ascertain what the law of that country was: and as that was the place where the deed was executed, it should be regulated by the law of that country and of that place. As the Courts there had decided in Miss Brown's favour, and the trustees had produced no evidence of a reversal of that decision, I have no difficulty in adhering to the interlocutor of the Lord Ordinary.

*Lord Robertson.*—I agree with Lord Eldin and Lord Alloway, and the pursuer; and indeed all parties agree that the fee of this legacy is vested simply and absolutely in Mary Brown. No

\* The rest of the case related to subsequent transactions between John and Mary Brown, and had no bearing whatever on the point of domicile.

determined according to the law of the place where a person was casually resident, and not where he was domiciled. This we never maintained: but if the doctrine of the *lex loci rei sitæ* were to prevail, it would go

satisfactory answer is made to her assertion, that the settlement was regularly brought before an American Court, who decided in her favour.

*Lord Pitmilley*.—I think the decree is quite decisive.

*Lord Alloway*.—I agree with your Lordships, that this case was decided in the most formal and regular manner in 1816. The decree of this foreign Court is completely established. The judgment was pronounced in 1816, but they never attempted to bring the sentence again under the review of the American Court.

The reasons for the appellants, with reference to the interlocutor of the 14th of December 1824, state: "They do not know how the meaning of a foreign instrument can be said to be obvious to a Scotch court, when its meaning is disputed and all foreign evidence upon the subject is excluded. Words may have one meaning when read by the law of one country, and another meaning when read by the law of another country. Accordingly the better practice of the Court of Session has always been to treat the law of a foreign country as a fact, and let it be proved by professional opinions. This was done in the cases of *Robertson*, of *Trotter*, and of *Murray*: all of these questions turned upon the construction which the law of England applied to words used in wills executed in India; and if their mere obviousness in common language had been held sufficient, no inquiry would have been necessary." They then proceeded to deny that there was any legal evidence before the Court of the American decree; that it was made in the absence of John Brown, and the mere fact of decreeing the money to be paid to Mary Brown, who had no children, without security, did not decide that she was entitled to it absolutely.

On the other hand, the printed reasons for the respondents stated:—"All inquiry upon the construction of the American will was wholly incompetent and irrelevant, and no defence against this action arose from the terms of that will. The fee of the legacy was clearly vested in Mary Brown. It was indeed maintained in the Court below, that however plain the construction might appear to the Judges, they were not entitled to form an opinion, because the meaning of the will ought to be determined by the law of the country where it was executed. The question is merely one of intention, and not one depending upon any technicalities of law. If there had been any difficulty in the construction, this would have been only determined by the opinion of American lawyers, as by the argument maintained on the other side, the law of America must form the rule: and an opinion of a Virginia lawyer, in opposition to an English lawyer, was given, that Mary Brown was entitled to the legacy in fee, subject only to the contingency of her having children. It was unnecessary however to enter into any discussion as to what the American law might be, as that law was expressly declared by the American Court itself."

In the foregoing case the deceased, though of Scotch birth, had clearly abandoned his *forum originis* entirely and for ever. It did not appear that he ever visited or contemplated a return to Scotland; his property was all in America or England; he had none either real or personal in Scotland. The will describes him as of Virginia, and makes no allusion whatever to his connexion with Scotland or any other country than America; except that the parties benefitted are all Scotch, it has no reference whatever to Scotland: it was not executed in the Scottish forms, but he had in its execution adopted the formalities required by the law of America. It was executed there—was proved there—was principally to operate on property there. To construe the will therefore by the law of America, was to construe it in conformity not only with the presumed or probable, but with the almost certain intention of the testator, and was to follow that law which the deceased himself had adopted. The validity of the will was not in any way in question, and the decision of a competent court in a suit to which both appellant and respondent were parties, had been acquiesced in for ten years. There is no one circumstance, except perhaps the domicile in a foreign country, that can give it any material bearing on *Stanley v. Bernes*. In all other respects it is an infinitely weaker case than either that of *Sir Charles Douglas*, or of *Anstruther v. Chalmers*: in the former of which cases the death occurred in Scotland, and in the latter the deceased's intention to exclude Mrs. Lashley from her legitim was indisputable. Had a will, executed under such circumstances, and solely with reference to the laws of America, by a person thus domiciled in America, come before the Prerogative Court, it is conceived that Court would at no time have hesitated to follow the decision of an American court pronouncing for or against the validity of the will. In such cases the Prerogative Court probably acts on the principle, that the deceased having chosen to impose on himself the formalities required by the *lex domicilli* must adhere to them, in the same way that if a person by an attestation clause evinces an intention of having witnesses to a will of personality, such will is *prima facie* invalid without them. In both cases, the deceased having imposed them on himself, must adhere to formalities originally unnecessary.

far to deprive parties of the power of making a will of property situate in a different country from that of their domicil. This cannot be the law of any civilized country. We contend that the personal representative must be ascertained by the *lex domicilii*.

On the question of domicil the appellants cited, *The Harmony*, 2 Robinson, 324. *Ann.* 1 Dod. 221. 2 Dyer, 165 b. *Campbell v. French*, 3 Ves. 323. *Sawer v. Shute*, 1 Anstr. 63. *Scott v. Swartz*, 2 Com. 677. *Pipon v. Pipon*, Ambler, 25, 799, ed. 1828. *Potter v. Brown*, 5 East, 131. *Anstruther v. Chalmers*, 2 Sim. 1. *Re Ewing*, 1 Tyrwhitt, 91, 14 and 15 Hen. 8, c. 4.

The Court mentioned the following cases: *Bell v. Reid*, 1 M. & S. 726. *Adam v. Kerr*, 1 B. and P. 360. *Alves v. Hodgson*, 7 T. R. 241: and that there were several cases in bankruptcy.(a)

*In reply.*

The *King's Advocate* and Mr. Serjeant Stephen.(b)

The cases from the Admiralty Reports merely apply to national character as relating to commercial purposes. The case of *Ewing* has reference only to the statute law, and would apply equally to temporary residence as to domicil. *Hog v. Lashley* was not relied on in the Court below as a case in point: no facts are set forth; it did not relate to the validity but only to the construction of a will; it is of no weight. None of the other cases cited on the other side bear with any stringency on the point. The law of no country prevails out of its territory unless by comity,—Voet. Lib. I. t. 4, pars 2, and this comity does not apply universally but partially;—not to immoveables nor against a positive law. Huber de conflictu legum, Lib. I. t. 3. Therefore it does not apply to this case; for money in the funds has been considered in the nature of immoveables; thus by 3 G. 4, c. 9, s. 2, the dividends of these funds are secured on the consolidated fund which by 56 G. 3, c. 98, s. 1, includes the land-tax; s. 13, however, provides, that parties shall be possessed thereof as of a personal estate devisable as such: thus giving to all indiscriminately the privilege of devising it by less strict forms: why then should the testator, or even a natural born Portuguese subject, be deprived of the privileges granted by this positive law? Except to effectuate the intentions of the parties, (Voet. L. I. t. 4, pars 2,) or to protect creditors, as in the cases in bankruptcy, the *lex loci rei sitæ* prevails, because there is nothing to counteract it; and there is no comity to a foreign law merely as such. In the case of *Ewing* effects in France were held not liable to the legacy duty. Why? by reason of their

(a) See Montagu and Gregg's Bankrupt Laws, ed. 1827. Vol. I. pp. 172, 3; 362—4; 427, 8; 503, 4; and the cases therein cited. Also see *Selkirk v. Davies and Salt*, 2 Dow, (First Series,) 230. 2 Rose, 98, 291. S. C. *Bank of Scotland v. Cuthbert*, (1 Rose, 462,)—characterized by Lord Eldon as a report indeed well worth looking at—2 Dow, 245. The principal authorities and cases are there commented upon. *Ex parte Geddes*, 1 Glynn and Jameson, 414. As to legacy duty, see *Attorney-General v. Cockerell*, 1 Price, 165. See also *Pottinger v. Wightman*, 3 Mer. 67. *Doe v. Verdill*, 5 B. and C. 438, and the dicta of Abbott, C. J., Holroyd, J., and Littledale, J., and the authorities cited. See also, relative to the law which governs the succession of personality, Sir Leoline Jenkins' letter to Lord Arlington, the memorial of the French lawyers, and the reply of Sir L. J. on the conflicting claims to the personal estate of the Queen Mother (Henrietta, widow of Charles I.,) who died intestate in France. *Life of Sir L. Jenkins*, Vol. II. pp. 663, 669; and Kent's Commentaries on American Law, Vol. II. p. 344, 5, (New York, 1827.) He says: "Personal property is subject to that law which governs the person of the owner:" and cites Bynkershoek (Quæst. Jur. Priv. L. I. c. 16,) adeo recepta hodie sententia est, ut nemo aut contra hanc.

(b) Mr. Alderson having become a Judge of the Court of Common Pleas.

locality. In England, even in intestacy it is only the distribution which follows the *lex domicilii*. The succession, properly so called, that is, the representation, is governed by the *lex loci rei sitæ*. No notice is taken of foreign probates and administrations: but for any effects here an English representation is necessary. 11 Vin. Ab. Tit. Executors, R. 3. *Jauncey v. Seeley*, 1 Vern. 397. *Tourton v. Flower*, 3 P. Wms. 369. *Pipon v. Pipon*, Ambler, 25.

At common law the goods of the intestate passed to the Ordinary, and therefore the law of England governed as to the succession; and still that law governs the succession by effect of the statutes. In granting administration to a domiciled Scotsman where the half blood do not succeed, the Court could not exclude a brother by the half blood in favour of an uncle by the whole blood: nor could it exclude the mother, who by the law of Scotland cannot succeed to her children, in favour of a brother. This shows that the representation is at all events to be governed by the English law, whether the Court of Construction would hold the administrator cum test. ann., a mere trustee for the next of kin or not. It is a fallacy to say that if the next of kin is beneficially entitled by the law of Portugal, therefore of necessity he is entitled to the administration: for if the law of Portugal is to govern in all respects, no administration at all would be necessary;—the effect would pass under the authority of the Portuguese law without the exercise of any authority here. It is a fallacy to say that because personal property is to be distributed according to the law of the domicile in cases of intestacy, therefore the validity of a will must be determined according to the same law. The true question is, Was not the deceased testate in England? As the law of England must decide whether the property is real or personal (Voet. L. 5, t. 1,) it must decide whether the person be testate or intestate. It is a fallacy to say that he cannot be testate in England and intestate in Portugal. It is clear he may be so in the case of immoveable property, and *è converso*, testate in Portugal and intestate in England. It is a fallacy to say that if the will be proved here, it is holding personal property local or governed by the *lex loci rei sitæ*: it is not the property that is to be governed, but the character of the instrument by which it is passed; and all the Jurists say, that that is not to be governed by the *lex domicilii*, but by the *lex loci contractus*, save that when executed in reference to another country, it is governed by the law of that country. Huberi Prælect. Tom. 2. L. 1, t. 3, s. 5. *Robinson v. Bland*, Burr. 1077. A will is analogous to other alienations. Grotius de Jure Belli. L. 11, c. 6, s. 14. It would be strange if it were otherwise, because the law of execution of instruments is a mere rule of evidence. Heinec. Recitat. L. 11, t. x, s. 492. Voet. L. 28, t. 1, s. 3: or if rather a rule of solemnity, why should the comity of nations apply to exclude the intention of the party? It will apply to effectuate intention. Thus a will executed according to the forms required by the *lex domicilii* may be valid for the disposal of property in every part of the world: but is the converse necessarily true, that if not executed according to those forms it must be invalid? Is it not more reasonable that the party should have the option of determining whether he shall execute his will according to the *lex loci rei sitæ* or according to the *lex domicilii*? The same principle on which the law of domicile is said to prevail in intestacy,—viz. presumed intention—would perhaps require that, *prima facie* and in the absence of manifest intention on the part of



the deceased to adopt the formalities required by the *lex loci rei sitæ*, the validity of a will should be determined by the *lex domicilii*: but the principle cannot apply where that presumption is negatived by clear and decisive evidence. If then these codicils had been executed according to the Portuguese forms, but not according to the English, they would have been proveable here; and on the same principle the present codicils should be proveable. The execution of these codicils at Madeira with reference to effects in England is the same as if it had taken place in London: and could it then be contended that they were not valid? It is not the same case as if they had been accidentally conformable to English law: but here the intention was to pass English property in an English form:—why is not this sufficient in a will as in the case of other instruments?

On 11th February, 1831, the Judges reversed so much of the decree of the Prerogative Court as pronounced for the third and fourth codicils and the addition to the third codicil, and decreed letters of administration (with the will and first two codicils) to John Stanley, the residuary legatee, and directed the costs to be paid out of the estate.

On a subsequent day it appeared that though all the other executors had renounced, Mr. Gordon—whose appointment under the first codicil, revoked by the third codicil, now revived owing to the invalidity of that third codicil—had not renounced; a decree issued, calling upon him to take or renounce probate, and the same having been served upon his agents in London, and personally upon himself at Madeira, and no appearance being given, the order of the 11th of February, 1831, remains unrescinded: and Mr. Stanley has, accordingly, taken the administration with the will and two codicils annexed.

#### WYATT v. INGRAM.—p. 466.

Sentence of the Prerogative Court reversed,semble on the ground that the facts disclosed in evidence established capacity, and volition, and sufficiently rebutted the suspicion—arising from the relation of client and attorney subsisting between the testator and the executor and residuary legatee—and from the conduct of the latter.

A commission of Review is not grantable, unless the Lord Chancellor be satisfied that the principles of law on which the Court decided were wrong, or that the facts were either misstated or misunderstood.

Where a will is impeached on the ground of fraud, the parties who seek to establish the will must remove or explain and so neutralise the facts out of which the suspicion arose.

The relation of client and attorney between a testator and the person benefitted by his will excites suspicion.

From the judgment pronounced in this case in the Prerogative Court, (1 Hagg. 384,) an appeal was prosecuted to the Delegates, where the cause was argued before Littledale, J., Gaselee, J., Vaughan, B., Burnaby, Daubeney, Gostling, Addams, Blake, LL. D., by Dr. Lushington and Mr. Knight, (with whom were Dr. Dodson and Mr. Thessiger,) in support of the sentence: by the King's Advocate, the Attorney-General (Sir J. Scarlett,) Dr. Phillimore, and Mr. Follett, contra.

The Court adjourned till the 20th January, when the cause was again directed to stand over till the 8th July; on which day the Court, being equally divided in opinion, no sentence was pronounced.

A commission of Adjuncts having issued, the cause again came on for argument before the Judges, above named, and before Parke, Justice, (K. B.) Bolland, B., Bosanquet, J.; and after hearing Dr. Lushington, Dr. Dodson, and Mr. Thessiger in support of the judgment, and counsel (as before) contra, the Court reversed the sentence of the Court of Prerogative; decreed probate of the will and codicil to Wyatt, and the costs of the appeal out of the estate. (a)

A petition, afterwards presented for a commission of review, was in the usual course referred to the Lord Chancellor: and the question was argued by Sir Edward Sugden and Dr. Lushington, (with whom was Mr. Wakefield,) in support of the application, and by the King's Advocate and Mr. Follett, contra (b), the Lord Chancellor's judgment,—after referring to the cases of *Matthews v. Warner*, 4 Ves. 186, *Goodwin v. Giesler*, Ib. 211, n., *Ex parte Fearon*, 5 Ves. 633, and *Eagleton and Coventry v. Kingston*, 8 Ves. 438, for the principles on which such applications were to be considered,—was in substance as follows: "Then were there in this case any such questions of law, or had any of the facts been overlooked or misstated, or misunderstood? From the elaborate judgment which had been pronounced by the Judge in the Court below, by whom the case had been first decided, it was obvious that scrupulous attention had been paid to every part of the case. He had found, on examining the facts, that they amounted to a case of suspicion, and he had therefore called for a greater degree of proof on the other side, additional evidence in proportion to such suspicion, in order to clear up or remove the effect of that suspicion. In cases of wills impeached on the ground of fraud, it was incumbent on the parties who sought to establish the will to remove or to explain, and so to neutralise the facts out of which that suspicion arose. The learned Judge in the Court below had acted upon this, and had examined the evidence for the purpose of seeing whether the suspicion which unquestionably existed had been removed. He went through the facts of the case, and they could not be said to carry it further than a case of suspicion; but he thought fit, in the sentence he pronounced, to declare that the will was invalid. The Court of Delegates, pursuing the same course of investigation, were of opinion, that, notwithstanding the suspicion, the balance of the testimony was sufficient to support the will, and they accordingly reversed the decree of the first learned Judge. The great admitted fact of suspicion arose from the circumstance that the testator and the person to be benefitted by his will stood in the relation of client and attorney towards each other (c). This point the Court of Delegates had considered, and they were in the result satisfied that the other circumstances of the case were strong enough to rebut the presumption which necessarily arose from that relation: and which presumption, if they had

(a) The following were among the cases cited in support of the judgment:—*Billinghurst v. Vickers*, 1 Phill. 187. *Paske v. Olat*, 2 Phill. 323. *Barton v. Robins*, 3 Phill. 455. n. *Middleton v. Forbes*, (cited by the Court, 1 Hagg. 395.) *Wells v. Middleton*, 1 Cox, 112. S. C. 4 Bro. P. C. 245. *Gibson v. Jeyes*, 6 Ves. 266. *Eagleton and Coventry v. Kingston*, 8 Ves. 438. *Wood v. Downes*, 18 Ves. 120. *Walmesley v. Booth*, 2 Atk. 27. *Swundersson v. Glass*, Ib. 297. *Woodhouse v. Shipley*, Ib. 535. *Webb v. Claverden*, Ib. 424. *Ward v. Hartpool*, 3 Bligh. 471. *Hatch v. Hatch*, 9 Ves. 292. *Watt v. Groce*, 2 Sch. and Lef. 502. *Sheppard's Touchstone*, 496.

(b) In addition to the cases cited in the Delegates, the following were quoted on the same side:—*Wright v. Proud*, 13 Ves. 138. *Pitcher v. Rigby*, 9 Price, 79. *Segrave v. Kiron*, 1 Beatty, 157. *Mountain v. Bennet*, 1 Cox, 353.

(c) See *Paine v. Hall*, 18 Vesey, 475; referring to the case of *Hicks v. Parr*, before Buller J. at Winchester Assizes, 1789, cited by Lord Eldon in *Trimbletown v. Lloyd*, 1 Bligh. 449. 458. 476. (S. C. 1 Dow, n. s. 85,) and in *Walker v. Stephenson*, 3 Esp. 284, and by counsel, 4 Esp. 51, and noticed by Buller, J. in *Revett v. Braken*, 4 T. R. 497.

not believed it to be rebutted, would have given a contrary turn to their decision. They had considered the proofs which had been given of the state of the testator's mind, his capacity to make a will, the singularity of his conduct, the eccentricity of his habits, and all those other circumstances relating to the testator personally, which were in the main admitted on both sides, although exaggerated by some witnesses, and attempted to be softened by others. They had not overlooked the evidence which went to show the feelings the testator expressed towards some of the relatives, the little care and interest he evinced respecting his property, and the little knowledge he had as to some part of it, and having well investigated and weighed all these, and all the other facts of the case, the Court of Delegates came to the conclusion, that the will in question was the will of the testator, and that it was not, as was alleged on the other side, the will of the Messrs. Wyatt."

The Lord Chancellor then—after stating that the Delegates had all the other facts before them,—that unless he could be satisfied that the principles of law on which that Court decided were wrong, or that the facts were misstated, or misunderstood, it was impossible he could recommend the Crown to grant a commission of review; a doubt was not sufficient; he must be convinced that the Judges were clearly wrong; one sentence was the opinion of a single mind; the other of various minds of different professional habits and modes of thinking, proceeded,—“If he were to pronounce upon the evidence, to the whole of which he had attended, and which he had weighed with the most scrupulous care, all that he could say of it was, that it had in some respects tended to raise doubts in his mind which had not been removed by any thing he had heard; but even with the existence of those doubts, and after giving to the evidence on either side the full value to which it was entitled, he could not bring himself to any other conclusion than this—that if he had been one of the Judges of the Court of Delegates, he should in all probability have nevertheless joined them in the sentence which they had pronounced.” His Lordship then adverted to the evidence (and to the observations tending to take off the effect of that evidence) of the factum—particularly that of Mr. Adlington,—of declarations in favour of Wyatt, and of the illness of Wyatt's father to account for his non-production as a witness:—and proceeded—“These had, it appeared, all been discussed before the Court of Delegates; the doubts arising from such facts, and the difficulties occasioned by the conflicting evidence on various parts of the case, had all been weighed, and considered, and decided upon by that Court. His Lordship did not therefore feel himself authorised to say that there had been any miscarriage before the Delegates, or that any part of the case had been so overlooked as to render any further inquiry or further deliberation necessary . . . . Looking to the conduct of the parties after the execution of the will, it was perfectly natural and perfectly reasonable to question the circumstances under which the will was executed: but this conduct, as well as all the other facts connected with the case, had their due share of consideration, and formed one of the grounds on which the Court of Delegates had exercised their judgment. For these reasons, then, and acting upon the authority of the cases to which he had adverted, he should feel it to be his duty to tender his advice to his Majesty against granting the commission prayed; and should make his report, adopting, with a few exceptions, the language of Lord Eldon's certificate in *Eagleton v. Coventry*. It would have been

more satisfactory to him, if he had ascertained that he had any power to interpose, as to costs, in favour of the parties by whom this application was made. If he should find, upon further examination and inquiry, that he had any power to deal with that question, he should take it into his consideration."

On a subsequent day the Lord Chancellor stated, that on investigation he was convinced that he had no authority on the question of costs.

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TYRRELL and HARDING v. MARSH.—p. 471.

THIS was an appeal from the sentence of the Prerogative Court (see 2 Hagg. 84,) and the cause was argued by the King's Advocate and Dr. Addams for Mr. Marsh; by Mr. Campbell, Dr. Lushington, and Mr. Skirrow for Mr. Tyrrell; and by Mr. Brougham, Dr. Phillimore, and Mr. Follett for Mr. Harding.

The Court, consisting of Littledale, J., Parke, J., Bolland, B., and Burnaby, Daubeny, Gostling, and Blake, LL.D., gave no sentence.

A commission of Adjuncts issued, when the parties having entered into a compromise, the sentence was reversed by consent.

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IN THE ARCHES COURT OF CANTERBURY.

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HIGGS v. HIGGS.—p. 472.

In an allegation of faculties, the amount of capital embarked, or the particulars of partnership concerns, is not to be set forth, but only the income.

THIS was a suit of divorce, brought by letters of request from Leicester: the present question respected the admission of an allegation as to the husband's faculties to alimient his wife.

The *King's Advocate* in opposition.

*Addams* contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit brought by the wife for separation by reason of cruelty and adultery. A libel, charging both, was given in on the first Session of Easter Term, 1830: no defensive allegation having been given in, publication passed; and the cause is ready for hearing. An allegation of faculties however has now been brought in, and it is desirable that it should be answered, because a constat of the property may be material, if the wife should be ultimately entitled to a sentence.

The first article pleads, that Higgs and Smith are partners in a hosiery business, and as lace merchants; that they employ one hundred persons; that their annual returns are 14,000*l.* and that their income from the business is 1000*l.* of which Higgs is entitled to one moiety.

The Court is always especially cautious not to require a disclosure of partnership concerns or matters of business and trade; the only material

circumstance is, the amount of income. The first article therefore, in pleading the number of persons employed and the amount of the annual returns, is objectionable, and may be injurious to the interests of the partner. The wife will take all the benefit, to which she is entitled, by stating the income and that the husband is entitled to a moiety. If improper or insufficient answers are given, the wife will have the opportunity of examining the partner; but it is not at all necessary for her to have these details set out.

For the same reasons the second article, which pleads the capital embarked by the partners and that the husband is entitled to a moiety, is objectionable; and it is unnecessary, because the income has been already stated, and it is on that the alimony must be calculated.

The sixth article also which pleads, that she is unable to set forth the stock in trade and the debts due, is objectionable on the same grounds.

It is from forbearance to the partner, and not to the husband, that the Court requires these articles to be reformed. If the husband shall not fully and fairly disclose his income, then the wife may examine witnesses.

Allegation reformed.

### BIRNIE v. WELLER and ELLIOTT.—p. 474.

Where the person first elected churchwarden, had on payment of a fine been excused, a person, elected in his place, at the same vestry meeting, is bound to serve, unless some exemption be shown.

### LLOYD and CLARK v. POOLE.—477.

#### *On Appeal.*

On appeal in a pew cause from condemning churchwardens in costs, held, 1st. That giving or refusing costs is not a matter absolutely unappealable; though such appeals, especially for trifling sums, are much to be discouraged.—2d. That an appeal is perempted by doing any subsequent act in furtherance of the sentence—viz. attending taxation of costs.—3d. That churchwardens were properly condemned in costs, where the party proceeded against in substance succeeded, and the suit was rendered necessary by their undue suppression of information.

If a party does act in furtherance of a sentence, he bars his right of appeal.

To avoid defeating substantial justice the Court will, as far as it properly can, disregard mere form.

Churchwardens are entitled to protection, if they proceed fairly; if not, they are peculiarly responsible to the Court.

### JAMES and STANLEY v. KEELING—p. 483.

Churchwardens, and their predecessors, though constantly acting for a whole township consisting of three districts, were uniformly described as churchwardens of A., the principal place in the township and where the chapel stood. In a suit for subtraction of church rates, the Court reversed, with costs in both instances, a sentence sustaining a protest—that the defendant, occupying lands in the township, but not in the district in which A. was situate, was not legally sued by churchwardens thus described.

The office of the Judge promoted by BLISS v. WOOD.—p. 486.

*By Letters of Request.*

A clerk cannot under 7 and 8 G. IV. c. 72, s. 3, officiate, without consent of the Incumbent of the parish, in a newly erected chapel, consecrated and endowed as a chapel of ease, unless the right of nominating has, by *deed under seal* been *previously* declared to be in the Endower.

Under the general law, the erection of a new public chapel (properly so called) requires the joint consent of Patron, Incumbent, and Ordinary, and (generally) a compensation to future Incumbents.

The whole cure of souls, and all the emoluments of a parish, belong, under the original endowment, to the Incumbent and his successors, and vest in the existing Incumbent by institution and induction.

The earlier church-building acts, 58 G. III. c. 45, 59 G. III. c. 134, 3 G. IV. c. 72, carefully protect the rights and interests of Patrons and Incumbents, especially existing Incumbents, and 5 G. IV. c. 103, only allows a departure from that principle for a limited time, and under very special circumstances. Semble, that the sole object of 7 and 8 G. IV. c. 72, authorising the church-building commissioners to declare the right of nomination to be in the endower, with lands or money in the funds, of a chapel, without compensation made to the Incumbent, was to encourage such endowments, and that such chapel must (save as to the compensation) be built either in conformity to the general law, or under the provisions of the earlier church-building acts.

FULLECK v. ALLINSON.—p. 527.

A testamentary paper cannot be set aside on the ground of monomania, (the deceased's belief of an attempt to poison him,) except there be the most decisive evidence, that at the time of the factum of the paper, the belief amounted to insane delusion. Semble, that a will, of personality only, agreeable to long entertained intentions, prepared two months before, and execution merely delayed for want of witnesses, would be valid as an unexecuted paper, even though the execution finally took place during supervening insanity.

THIS was a cause of proving the last will, with three papers, (as codicils or additions thereto) of the Rev. John Monkhouse, promoted by John Fulleck, Esq., one of the executors, against Barbara Allinson, widow, the sister and only next of kin. The deceased died on the 15th of October 1828, aged 70. His will was as follows: "I John Monkhouse, late fellow of Queen's College in Oxford, and now Rector of Bramshot in the county of Southampton, and residing there, do make my last will and testament as follows, first expressing my belief in one God only, and in a future state of retribution as declared by Jesus Christ his authorised messenger." Debts and funeral expenses to be paid; 1850*l.* to the Provost and Fellows of Queen's College, Oxford, and their successors, in trust, to invest the same at interest on such securities as the law will allow; the interest to be applied in "teaching all the children from six years old and upwards, (and who shall be desirous of taking the benefit thereof) of all persons residing within the parish of Bramshot, whatever their religious persuasion be, in reading English, in writing, and in arithmetic; excepting such children as are bastards, or any children of persons giving to whoring, thieving, cheating, tricking, biting, overreaching or extorting; and I most earnestly desire that this exception may ever be attended to, which from the regard that persons ought to have for the welfare of their offspring will supply the best means I can leave behind me for counteracting the extreme dishonesty and great unchastity of the parish, and for promoting the probity and

virtue of its inhabitants." Plan of teaching to be Bell or Lancaster: suggests to the trustees the propriety of requesting the rector of Headley, the vicar of Selburne, and the rector of Bramshot for the time being to superintend, &c. To the said Provost, &c. 100*l.* for the repairs of their building. To the same 100*l.* "on trust, to pay the same to the treasurer for the time being of a voluntary society known by the name of the Unitarian Society for promoting Christian Knowledge and the practice of virtue by distributing books, the same to be applied to the purposes of that society. To the Provost, &c. all his books for the use of the library of the Tabordans of the said college; also 20*l.* to be paid by the Provost, &c. "in equal proportions, to ten poor families of the best general character in Bramshot." "To those who poisoned my faithful dog, my companion by day and my guardian by night, one shilling as a memorial." Residue to the Provost, &c. on the same trusts as respects the 1850*l.*

Henry Budd, Esq., John Fulleck, Esq., *Charles Butler, Esq.* (a) Rev. Robert Dickinson, rector of Headley, Rev. William Cobbold, vicar of Selburne, Henry Marshall of Godalming, (to each 5*l.* for their care herein,) "executors in trust of this my will which relates to my personal estate solely."

JOHN MONKHOUSE, (L. S.)

Dated 19th April, 1827.

Attesting witnesses:—John Parson, (Curate of Headley,) Samuel Charles Locke, (Curate of Bramshot).

1st Codicil, (No. 1.) To H. Budd, Esq., J. Fulleck, Esq., *C. Butler, Esq.*, and H. Marshall, all his real estate at Bramshot on trust to sell, and to apply the produce of the purchase money to the Provost, &c. of Queen's, upon the trusts expressed in his will: "and I bequeath to the executors of my will one pound to be applied in providing good wholesome milk, if it may be had, to be given to the children of the parish of Bramshot in the manner they shall think fit."

JOHN MONKHOUSE, (L. S.)

Dated 24th April, 1827.

Attesting witnesses:—Charles Mellersh, James Limbell, clerks to Mellersh and Marshall, Solicitors, Godalming, Sarah Loveland, servant to Mr. Marshall.

The will and this codicil were both in the writing of the testator upon one sheet of paper, enclosed in an envelope and endorsed,—“My will to be opened on my decease and not before.”

JOHN MONKHOUSE.

June 24, 1827.

“The executors are—Mr. Fulleck, Mr. Henry Marshall, Mr. Budd, Mr. Dickinson, and Mr. Cobbold.” (b).

No. 2 and 3 were labels in the deceased's writing—one inscribed “for Ann Anker, my housekeeper;” the other “for Hannah Harrison;” and each dated February 20, 1827; and attached to two canvass bags (found

(a) It appeared that the deceased was offended at Mr. Butler for his conduct while investigating, and his disbelief of, the attempt to poison the deceased's well; and therefore erased his name as an executor: the deceased also mentioned, two days before his death, a similar intention as to Budd's name, and for the same reasons.

(b) The deceased had transcribed, in the register book of burials at Bramshot, certain parts of his will; and also an abstract of the codicil (No. 1.) This transcript and copy were signed by him and dated May 1, 1827.

in the deceased's iron chest), the one containing 49*l.* 2*s.*, and the other 49*l.* 3*s.*, in silver.

These testamentary papers were opposed by the next of kin in an allegation setting up that the deceased was always odd and eccentric, particularly latterly; that William Harrison—who had married the deceased's niece, (Mrs. Allinson's daughter) had, in 1817, came from Cumberland at the deceased's desire to farm his glebe—at first resided with the deceased, then removed to a house a mile distant, leaving his daughter, then four years old, with the deceased; that until April, 1827, W. Harrison and the deceased continued to be on good terms together: that Harrison managed the deceased's tithes for him, and that the deceased constantly appointed him churchwarden of Bramshot, and on his influence, that he was appointed guardian of the poor: that he (W. H.) was appointed churchwarden and guardian of the poor on Easter Monday, 16th, of April, 1827, for the year ensuing. That in a day or two after such appointments had been made, the deceased under a delusion of mind declared, that the well belonging to his house had been poisoned by an infusion therein of mercury, or of arsenic, or other poisonous matter, and expressed a belief that the same had been done by Mr. Harrison or some of his family: that the well was about ninety feet deep and five in diameter at the top, and from twelve to fifteen at the bottom. That the deceased, in consequence of this delusion would not permit the water from the well to be used: and from such time the water for his house was brought from the well of John Cover, a labourer in his employ; to whom he sent directions to have the lid of his well fastened by a chain and padlock, and which was done: that the deceased, upon examination being dissatisfied with them, Cover, by his direction, fastened the lid with an iron bar, and a new padlock; and kept the well locked: that in the summer of 1827 the deceased was angry because there were chinks in the lid, and helped to fill them up with chips. That there was no poison in the deceased's well, and that his apprehensions were the effect of delusion and derangement; that he subsequently thought the water spouts, tank of rain water, the eggs, butter, and milk from W. Harrison were poisoned. That this belief continued to his death. It further pleaded vain attempts of his friends to remove this belief in respect to it, and to other matters, and his belief that his dog was poisoned in 1826: that the papers, pleaded as the will and codicils, were prepared and executed subsequent to the time when the deceased was impressed with the belief of the poison, and while he was of unsound mind and under mental delusion. It also pleaded affection for his sister, and that he was accustomed to afford her pecuniary assistance unsolicited (a).

(a) This allegation was brought in on 7th May, 1829; and on the 14th, four papers were brought in annexed to an affidavit by Mr. Marshall, the deceased's solicitor. No. 1. The draft of a will in the handwriting of the deceased, delivered to M. by the deceased shortly previous to November, 1819. No. 2. Draft of a will prepared therefrom by M. No. 3. Copy of a letter from M. to deceased, sent with such draft. No. 4. Instructions for the codicil as to the real estate, delivered to M. about the time the codicil was executed.

No. 1, was the will of 1819, the heading of which corresponded with the last will, except the words "his authorised messenger" were omitted. He left 3000*l.* stock to the Rector of Headley, vicar of Selborne, and rector of Bramshot—to pay the yearly interest to a schoolmaster; and after payment of such legacies as shall be hereafter mentioned, and of all just demands on him, all the rest and residue of his personalty to the same, in trust to build a school and master's house.



The allegation in reply, pleaded circumstances to show that the belief, that his will had been poisoned, was not an insane delusion; but was founded on rational though possibly on insufficient grounds; and that his conduct, conversation, and letters on this subject were rational and sensible: the plea exhibited a number of letters upon this subject, and others on matters of business, and a correspondence published in the *Gentleman's Magazine* proving that, as early as 1814, he had entertained Unitarian notions. It also pleaded that he had given instructions, in 1819, for a will of the same purport. The 43d article denied, that the papers were prepared after he had taken up this belief of poison; for, that some time before, in a conversation with one of the witnesses, he spoke of the will as being ready to be executed, and proposed, for the sake of privacy, to execute it at the witness' house; and that such intention was only postponed in consequence of the non-arrival of the witness' friend, who was then intended to be the second attesting witness. The 44th pleaded; that his belief in the attempts to poison him produced no change in his affection for his sister; for that he made to her the same small remittances which he had been accustomed to do before; that the day but one before his death, in a conversation with his solicitor, he expressed his adherence to the will. It also pleaded, that he had for some time disliked Harrison; that such dislike gradually increased; that he never confessed that Mrs. Harrison or the children were his relations; and that he never intended either of them to be objects of his testamentary bounty, but intended to give a small freehold to Harrison, for the title deeds of which he wrote to his solicitors on the 16th of February, 1827, declaring that he meant to deliver them to Harrison in his lifetime.

As the circumstances pleaded in the allegations on either side were established, with very slight exceptions, the question was, whether the belief which the deceased entertained was a sane or insane belief.

The *King's Advocate* and *Nicholl* in support of the will and codicils.

*Lushington* and *Dodson* contra.

JUDGMENT.

SIR JOHN NICHOLL.

The statement and observations necessary to be made in this case, as the reasons of the sentence the Court is about to give, need in no degree be proportioned to the bulk of the evidence which has been introduced into the cause. The material facts lie in a narrow compass.

The clause as to the exclusion of certain children, and his object in this exclusion, were the same as in the latter will.

Legacies, printed books to his successors, 100*l.* to the Provost of Queen's College towards the repairs of their buildings; 100*l.* to the treasurer for the time being of a voluntary society [its name or designation to be inserted here] for promoting, &c., as in latter will. Residue to the three trustees of personality, to the rector of Headley, &c., to be applied to the repair of the school and dwelling-house.

Executors—the three trustees.

Date in blank.—Signed, but not sealed: attestation clause, but no witnesses.

No. 2, exactly agreed with the last will, except in the omission of the words "his authorised messenger;" and of the description of the society; and that the books were bequeathed to — on trust to deliver to his successor. There was also a blank clause for legacies, and there was no clause respecting his dog. The appointment of executors was also left in blank.

No. 3, explained that these variations from No. 2 arose from legal difficulties in effecting the deceased's intentions in the mode that he proposed.

No. 4. "My house and gardens at Passfield in the pariah of Bramshot to be sold, and the interest of the money to be applied partly to the purposes expressed in my will, and partly in providing good wholesome milk (if it may be had) to be given to the children as opportunity serves."

The will, codicil, and two other papers propounded, are all in the handwriting of the deceased, and the will and codicil are regularly executed and attested. There is no question of the factum, nor of the intention, provided the deceased was of sound mind. The instruments are opposed on the ground of insanity.

The history of the deceased and of the parties connected with the cause is pretty accurately detailed in the allegation given in opposition to the will, and the circumstances therein stated will lead to some of those prominent points which are more precisely to be considered.

The deceased, the Reverend John Monkhouse, was the son of a Cumberland farmer, became a fellow of Queen's College, Oxford, and was for the last twenty years of his life, rector of Bramshot, Hants, a college living. He was always odd and eccentric in his habits; he resided in the rectory house, and was latterly very retired. His sister had two daughters, one married Harrison, then a farmer, near Penrith, the other married Moffat and resided with her mother. The allegation pleads affection for this sister, and that the deceased occasionally afforded her pecuniary assistance. In 1817, Harrison and his family, by the deceased's invitation, came to Bramshot to rent the glebe and manage the tithes, having previously sold off his own stock in Cumberland. For about two years he resided at the deceased's house, and then removed to a house about a mile distant, leaving one of his daughters, Hannah, about four years old, to reside with the deceased. After their removal the deceased continued on good terms with Harrison and his family. Harrison collected his tithes, was appointed his churchwarden, and, on his interest, guardian of the poor up to the 16th of April, 1827. The 6th article lays the origin and commencement of insanity—that it took place after the 16th of April, 1827; and between that time and the 19th of April the deceased was seized with the delusion of mind which led to the execution of the will; the will being executed on the 19th of April, the codicil on the 24th.

A great number of the following articles state circumstances taking place in May, June, and afterwards, all tending to confirm that this impression respecting the poison was a delusion of mind; and the 26th article sums up the averment and fixes the insanity to this impression: it pleads, that the instruments propounded as the will and codicils of the deceased "were prepared and executed subsequent to the time when he first became impressed with the idea that W. Harrison and his family had made an attempt to poison him, and whilst he, the deceased, was of unsound mind, and under mental delusion."

The great mass of the evidence and the principal bearing of the arguments are to show delusion in May and June 1827; but the precise question is, whether, at the time this will and codicil were prepared the deceased was become insane. The fact may bear differently on the will and codicil: they are of different dates; there is an interval between the execution of them, and a much greater interval between the times of their respective preparations. They are subject to different rules of law; for the will applies solely to personal property, the codicil exclusively to real—except a legacy of one pound introduced rather to record an opinion than as an operative bequest.

The deceased was undoubtedly a very eccentric man; but actual insanity is not alleged before Easter 1827: he kept large sums of money in his house, which was rather retired; he carried arms; he kept New-

foundland dogs both as guards and companions, and was very much attached to them. In 1824, one of these favorite Newfoundland dogs, called Carbo, died. The deceased thought she had been poisoned; he had her buried, and wrote some verses on Carbo: but thinking she had been poisoned was no delusion; others from the symptoms and appearance of the dog thought so too, particularly Moore, the farrier who attended her. The deceased could not fix on the person who had poisoned her, but he had his suspicions.

His parish was not of a very moral character—particularly in regard to the virtue of chastity—there were many illegitimate children. The deceased (whatever might be the heterodoxy of his religious opinions) seems to have been a strictly moral man, and to have had strong moral feelings. Whenever any of these illegitimate children were christened, he recorded the circumstance and the character of the mother in the parish register, extracts from which to the end of 1827 have been exhibited (a).

This may be eccentric, odd, irregular, and improper; for all such irregularities in a clergyman are improper: but it is not insanity. If it be insanity, he was insane for the last 15 or 16 years, or perhaps all his life; but it is impossible to maintain that such conduct would render invalid any and all acts respecting his property.

It comes then to the consideration whether, at the time these testamentary acts were done, the deceased was intestable, so as to vitiate and render invalid the instruments propounded. The will, as I have said, is all in the hand-writing of the deceased; it is remarkably well written, without alteration or erasure at the time of the execution; it bears no appearance of excitement or hurry—the date was filled in at the time of the execution—it is signed and sealed—there is a full attestation clause—and it is attested by two witnesses—both clergymen—one his curate—the other the minister of an adjoining parish—both intimately acquainted with the deceased. Not only is it to be presumed that these two clergymen would not have attested the act unless satisfied of the sanity of the testator; but they do both in the most unhesitating manner depose to their full belief that the deceased was of perfect sound mind; and they thus depose notwithstanding at the time of their examination they were aware of all the deceased's subsequent opinions respecting the poisoning.

Next, as to the contents of the will. That he was an Unitarian, however much to be lamented in a beneficed clergyman, does not render him intestable. Unitarian opinions he appears long to have held. It appears that he made the college trustees by the advice of his solicitor, to avoid the statutes of mortmain; but the passage relating to the poisoning of his dog is that on which reliance has been placed as manifesting the existence of insanity. That clause is certainly odd and eccentric; it does not however record a delusion, but an opinion which he held in common with others, and for which there were rational grounds of belief,

(a) In addition to these entries applying to particular individuals, there was at the close of the book of baptisms ending 1812, a memorandum in the deceased's handwriting:—"The want of honesty and chastity are the prevailing defects here; I would give ten of my parishioners for one honest man, till the whole population was renewed." Again, in the book of baptisms for 1821-2, "Of seventy-two marriages in the last ten years, not less than sixty-nine females have been unchaste before marriage. Those who gain husbands are more fortunate than those who bear bastards; but not more virtuous."

(Signed) J. MONKHOUSE.

or at least of suspicion, and this opinion was recorded to prick and sting the conscience of the perpetrator whoever he might be. This clause will not then, as evidence of defective capacity, vitiate the will.

If this disposition had been a departure from the long course and current of his affections and testamentary declarations towards his family, it might have furnished some marks of that capricious malice and change which often accompanies insanity;—but the fact is the reverse: whatever little patrimony he had he seems to have left with his sister, but he kept up no direct intercourse—he had not been in Cumberland since 1800—instead of large and constant pecuniary remittances, he sent three times, on the solicitation of a friend, 5*l.*, and part of that donation he, on one occasion, desired to be applied to the use of a school, showing, as the will itself does, that he was interested in the education of the poor. The disposition therefore is not a change from affection to his relations, for even Harrison and his wife, the niece of the deceased, were hardly acknowledged by him, and their daughter, Hannah, was brought up, not as a favourite relation, but as a servant: while, on the other hand, the disposition is in principle the same as the deceased had intended during the last ten years of his life: this is manifest from the testamentary instrument prepared by the deceased himself in 1819; which is all in his own hand-writing, is carefully drawn up, is fairly written; he carries it to his solicitor, but as it gave the property in trust to his successors at Bramshot, the bequest could not have been carried into execution. The deceased and his solicitor correspond on the subject; the latter prepares a draft making the college trustees, and sends it to the deceased accompanied by an explanatory letter.

So far then as the disposition is concerned, here were precisely the same intentions in 1819, and expressed nearly in the same terms. At that time his soundness of mind is unquestioned, however peculiar some of his opinions might be. Whether the deceased ever executed a will to that effect does not appear, but the intention continued—at least it was existing long before the suspicion respecting the poison arose.

It does not exactly appear when the instrument propounded was first written—it was after the death of his dog Carbo in 1824; for that event, as has been already mentioned, is recorded in it. It was written and ready for execution in February 1827, as appears from the evidence of Mr. Parson; it was probably written about the same time as the labels (annexed to the two bags of money) propounded as testamentary; they are dated the 20th of February 1827. This mode of bequeathing these sums was probably adopted to evade the legacy duty: whether that effect will be produced is not the question; but the bequests will be good as evidence of a clear intention to convey those benefits at his death to the persons named.

As to the will, the account given by the Rev. Mr. Parson, confirmed as it is by the other evidence in the cause, is quite decisive. “On the 16th of February the deceased asked him if he expected any friend to stay, as he had an instrument, and that indeed it was then in his pocket, to which he wished deponent and some friend to be a witness.” He answered, “He expected a friend from the neighbourhood of Basingstoke, and would let deceased know when he came.” Here then is the instrument prepared, and here is the intention to execute—and that intention only deferred, because he waited for witnesses whom he chose to select for that purpose. On the 7th of March the deceased repeated

the inquiry; again, on the 30th of March, just the same conversation took place, and on the 9th of April a similar inquiry was made. Parson says, "he remembers the conversation, for he wrote it in his journal." Having made these four inquiries in order to get Mr. Parson and some friend to attest the instrument, and finding that Mr. Parson's friend was no longer expected, the deceased, on the 19th of April, invites his own curate, Mr. Locke, to meet Mr. Parson at his house; and the will is, on that occasion, executed, and attested by these gentlemen.

Here then, for two months—from the 16th of February to the 19th of April—the instrument was ready prepared; the deceased was anxious to execute, and finally did execute it on the 19th. Suppose then, on Easter Monday, (for the insanity is not averred till after that day, and every witness on both sides says that on that day they would without hesitation have witnessed his will,) or on any previous day, the deceased had, by the visitation of Providence, been suddenly struck either with death or with violent frenzy, which had continued till his death, would that have affected the validity of the will, which disposes only of personalty? Here was an intention existing ten years before as to the disposition—the instrument ready for execution in February—all in the deceased's own hand-writing—the formal execution merely delayed to get such attesting witnesses as he wished, in order that the matter might not become known in the parish. If the intention continued, execution would not have been necessary under the circumstances I have supposed in order to give legal effect to the instrument—that instrument merely disposing of personalty. Assuming then, as pleaded, "that a day or two after Easter the deceased became under a delusion as to the poisoning," it could not affect this will merely of personal property.

This short view of the case seems to put an end to the question as to the validity of the will, for the will was valid at the time the delusion is alleged to have taken place, even supposing such a delusion to have arisen as from that moment rendered the deceased intestable.

The codicils may by possibility stand upon different grounds. That instrument contains a disposition of real property, though of no great value. The law respecting real property looks to the fact of execution—it is essential: if the deceased was of unsound mind when he executed the instrument, it would not be valid in law. The same effects would follow as if the deceased had died between the preparation and execution of a will of real property. The validity of this codicil seems scarcely a fit subject for the decision of this Court. The legacy of 1*l.* to provide milk can hardly be carried into effect, and the sentence of this Court will not of course bind the heiress at law. The Court will therefore not enter into any detail of reasons respecting the codicil. The disposition of it is the same as of the will, viz. that the property should go to the same trusts.

Now the presumption of law is in favour of sanity till insanity be clearly established. The alleged delusion in no degree respects the sister, who is the heiress at law of the real property and the sole person entitled to the personalty under an intestacy. At all events it was a monomania; for upon every other subject, from the time in question to his death, the deceased acts as a person of sound mind, memory, and understanding, as much as he had ever been: he manages his house—he manages his property and his farm—grants leases—receives tithes—keeps accounts—recognises his will—holds rational conversation—and

does church duty. A monomania to affect such an instrument, under such circumstances, should be clear in point of existence and decided in character beyond all doubt. That the deceased thought and believed that an attempt had been made to poison him seems to be a fact established; but is it established that his opinion in that respect was a mere morbid insane delusion rendering him intestable? The question is not whether the attempt to poison was really made, but whether he had grounds for suspecting it; or whether, as pleaded, "the deceased had no rational grounds whatever for his belief."

What then are the facts?

It seems pretty clearly established that he and his two servants were all taken ill together, with a complaint in the bowels and vomiting. The natural inference from this is, that something in their food had disagreed with each of them: it did not follow that it was poison—still less that it was poison purposely and maliciously introduced: but the coincidence was singular, and might naturally excite some alarm and suspicion. Another fact is, that there was some conversation between the two Harrisons—the boy and the girl—William and Hannah—about poisoning. Whether in consequence of this sickness something may have been said about poison, and repeated by the girl to the boy; or something said at Harrison's which the boy repeated to the girl—or how it happened is not very material—but this conversation being repeated either to the deceased's housekeeper, or to the deceased, and coupled with the sickness, might increase suspicion. The deceased was old—he was nervous—he was suspicious—he thought his dog had been poisoned—he suspected young Harrison; these circumstances together might create suspicion without a mere deluded imagination. To a suspicious mind, "trifles light as air are confirmations strong."

How does he act? As any rational person having the slightest suspicion of such an attempt would act: he goes to Godalming, consults a medical man, Mr. Balchin—he relates all the particulars; Balchin, neither from his relation nor from his deportment, thinks it mere morbid imagination—he advises him how to act—to take precautions—to use neither the milk nor the water. The deceased relates the same account to his solicitors—they have the same impressions and give the same advice—he is there two days—he has this codicil prepared—he copies it on his will and he executes it. His solicitors and the witnesses have full opportunities of judging of his deportment; and there was neither in the facts which he stated, nor in his behaviour, any thing to induce them to doubt his sanity. They at least thought he had rational grounds at that time for his suspicions. Can then, the Court venture to say that this suspicion, founded on these circumstances, was insanity—such decided insanity as rendered him at that time intestable and vitiated any civil act he could do?

Under this suspicion of an attempt to poison his milk he has a clause inserted in the codicil to give 1*l*. to provide wholesome milk. This records that he had the suspicion, but it goes no farther; it does not prove that the suspicion was an insane delusion: the fact might be true or false—but he had the grounds for entertaining the suspicion already stated: he inserts in his will the same sort of record in respect to his dog at least two months previously—before he is suspected of insanity; and there the fact was probably true, for at least in the opinion of others the dog had been poisoned.

The time of this visit to Godalming when the codicil was made is the most important period; but there are various subsequent investigations for the purpose of ascertaining whether any attempt to poison the deceased had been really made: or rather the inquiry is, whether there was any ground to charge Harrison and to take legal proceedings against him. The gentlemen, who conduct these several investigations, are satisfied that no attempt was made; that there was no sufficient evidence of the fact; and they probably come to a right conclusion, that no attempt whatever had been made; that no poison had been infused either into the milk, or into the bucket, or into the well: but the deceased adheres to his own suspicion; they cannot convince him: it does not follow that he was at first insane; he was not believing impossibilities—he was not believing that trees could walk, nor that statues could nod, nor any thing naturally impossible—of the falsehood of which reason must at once convince him. An opinion against rational probability is not necessarily an insane opinion; it is not drawing right conclusions from manifestly false premises, but erroneous inferences from premises which may be true. The deceased and his two servants had been simultaneously sick and ill. Some conversation about poison had taken place between the boy and girl. His dog had a strong appearance of having been poisoned three years before—he consults a medical man, relates all the circumstances and symptoms both to him and to his solicitors—they advise precautions—he carries some milk to his medical man, Balchin—Balchin cannot analyse, but he compares it with some milk of his own and they are different. “It had,” says Balchin, “a hot, brackish taste, and imparted the same sensation to his tongue as if there had been corrosive sublimate put into it: he was of opinion that the milk contained corrosive sublimate, and told the deceased there was something wrong in the milk.” Here there is ground for the suspicion: here is a medical opinion confirming the deceased’s opinion: that opinion might be erroneous—the taste might arise from some accidental cause—there might have been something infused into this milk, though not by Harrison. Certainly the deceased appears to have been sincere in his opinion that poisoning had been attempted—he adheres to that opinion—the gentlemen, who investigate the matter, cannot convince him that he is wrong in his opinion and that they are right. Even if all these investigations had made the impression deeper and his conviction stronger, till what was originally no more than suspicion at length grew into insanity, becoming a morbid delusion, which no proof nor reasoning could remove, still, that *ex post facto* delusion would not affect the validity even of the codicil. His whole conduct and deportment on the 23d and 24th of April were those of perfect sanity, supposing him to have any grounds of suspicion. The whole of his subsequent conduct is quite consistent with it—he retains his opinion founded on the circumstances referred to: but he manages his property, he occupies his glebe, he settles for his tithes; he keeps his accounts, he in some degree recovers his health and spirits. If insanity did exist, it is monomania in the strictest sense and to a singular degree. When such circumstances arose to excite the original suspicion, the Court is not prepared to say that monomania did exist when the codicil was executed.

To invalidate an instrument in the handwriting of the deceased, prepared from his instructions,—the solicitors, the medical person, the attesting witnesses, all concurring in opinion, and judging from the con-

duct and deportment that he was of perfect sound mind, the existence of insanity at that time ought to be clear beyond all doubt, in order to affect even the codicil; still less could this suspicion affect the will regarding personalty only, containing a disposition intended ten years, and, as appears, during the whole of ten years, prepared two months before, and the execution merely delayed to get witnesses.

In this view it is proper to pronounce for the will and the other two papers; and, as far as the Court has jurisdiction, for the codicil also.

*Lushington* asked for costs out of the estate. The only next of kin was excluded.

*The King's Advocate*—The executor cannot consent but does not oppose.

*Per Curiam.*

I am extremely disinclined to allow the costs out of the estate: but, considering the great extent of the property, I shall direct costs on both sides out of the estate to form part of the decree. It is under the very particular circumstances of this case that I grant them; but I am almost deterred from so doing by the great bulk of evidence introduced into the cause.

9.

#### ROBERTS v. ROUND and Others.—p. 548.

Testatrix having (without destroying the seal or signature) partially mutilated a duplicate will, but retained in her own possession, and carefully preserved entire the whole duplicate, such mutilation is neither a total nor partial revocation. On evidence of uninterrupted affection for the parties benefitted, will pronounced for. Costs out of estate.

THIS was a cause of proving the will of Diana Caswall; and was promoted by the sole executor and residuary legatee against the next of kin.

The allegation pleaded; that Miss Caswall died on the 23rd of April, 1830, leaving Susan Constantia (wife of J. Round, Esq.), Maria (wife of J. C. Bouchier, Esq.), Mary (wife of J. G. Wilkinson, Esq.), and Ann (wife of J. Rolt, Esq.), her nieces, only next of kin, and the only persons in distribution: that her personal and real estate was each of the value of 30,000*l*.

2. The execution, in duplicate, of the will, on the 11th of April, 1814.

3. That when she gave instructions for her will, she showed to Mr. Dance, the solicitor, a previous will, whereby she had devised her four estates to the eldest four of the five daughters of her brother; and which provided that if either of the four died, the estate left to that one should go to the next younger sister; that Dance then pointed out, "that in that case her brother's youngest daughter would not be entitled to any estate except in the event of the death of the fourth daughter, and suggested, that as the several estates were very unequal in value, a provision for her youngest niece might be made by a charge upon one of the larger estates;" to which she replied, "that she would not divide an estate;" that Dance then suggested, "that she might treat her leasehold house in Davies street as a fifth estate, so as to give a property to each niece;" that she replied, "No, the Davies street house must be for my eldest niece:" that Dance then said, "that in case of the death of either of her nieces she must reconsider the will she was about to make, and adapt it accordingly:" that after the death in 1815, of the third daughter (one of



the legatees,) Dance reminded the deceased as to the effect of her will; to which she replied, "she would consider of it:" that upon his again shortly afterwards, mentioning the subject, she replied, "that she felt a difficulty about it; that she did not like to make another will without naming her brother an executor, which she should not do."

4. That the will was kept by the deceased; that the duplicate was immediately after the execution sealed up in an envelope, and left with Dance, who so retained possession of it till October, 1827, when he delivered it to her, at her request; that she did not afterwards ever allude to her will, or to the duplicate, or to her testamentary intentions to Dance (though she saw and consulted him on legal business several times during her last illness, and for the last time on the 7th of April, 1830,) or to any other person, save that in November, 1829, she inquired of Dance, "how her property would go if she died without a will;" when he informed her. That the duplicate was, when delivered to the deceased, sealed up in its original envelope, and was in the same condition as when executed, and that it remained in her possession to her death.

5. That, on the day next following the deceased's death, the will and duplicate were found by Mr. Dance, Mr. and Mrs. Round, and Mr. and Mrs. Bouchier, in the deceased's portfolio, which was on her bed to the time of her death; and was at her request taken to her by her nurse in the presence of Matthews, her confidential servant, on the evening next preceding her death, that she might see if it was locked; and that it so remained locked, (the key being kept by the deceased,) and was, very shortly after her death, delivered by Matthews to Mr. Dance, Mr. and Mrs. Round, and Mr. and Mrs. Bouchier. That the will, found in the portfolio, was enclosed in an envelope endorsed, in the deceased's handwriting, "My will, dated the 11th of April 1814:" that on the duplicate being found in the portfolio, the first sheet was discovered to have been mutilated or cut as the same now appears (a). That the deceased was confined to her bed-room by her last illness for about two months, during which time the portfolio was never removed from her bed-room,

(a) "I give and devise all those my freehold messuages, &c., in &c., unto and to the use of my niece *Susan Constantia Caswall, eldest daughter of my brother, George Caswall, of Sacomb Park, in the county of Herts, Esquire,*" her heirs and assigns forever. I also give and devise all those my freehold messuages, &c., in, &c., to the use of my niece, *Maria Caswall, second daughter of, &c.,* her heirs and assigns forever. I give and bequeath all those my leasehold messuages, &c., in, &c., unto my niece, *Eliza Caswall, third daughter of, &c.,* her executors, administrators, and assigns. I give and devise all my copyhold or customary messuages, &c., in, &c. to the use of my niece, *Mary Caswall, fourth daughter of, &c.,* her heirs and assigns for ever. I bequeath all that my leasehold messuage, No. 33, Davies Street, &c., from and after the expiration of one calendar month after my decease, unto my niece, the said *S. C. Caswall*, her executors, administrators, and assigns; and in case any of them, my said nieces, shall happen to die in my lifetime, or after my decease, and without lawful issue, then I bequeath the estate and premises hereinbefore devised or bequeathed unto her or them respectively, unto the next younger sister of her so dying as aforesaid, and to the heirs, &c., of such next younger sister according to the nature and quality of the estate." The will then gave two leasehold houses, and 500*l.* Bank Long Annuities to Miss Roberts, and contained this clause;—"I give unto my niece *S. C. Caswall* all my household goods, furniture, &c. &c., and all other effects and things which shall be in my house at my decease, except moneys or securities for money, and except such articles as are herein otherwise bequeathed." The deceased further gave various legacies, and minutely specified the proportions in which her nieces should take her trinkets, furs, and lace, bequeathing "her beads of different colours to be equally divided between her nieces *Mary and Ann.*"

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\* The parts in *Italic* were cut out.

and, previous to her illness, it was usually taken to her bed-room at night; that it was left sometimes in the sitting-room all night, and was so left, with the key in it, one night in November or December 1829.

6. That one evening, in or about November 1829, the housemaid found on the carpet in the dining-room a paper writing, alleged to have been part of, and cut from, the first sheet of the duplicate; that the housemaid put it between the leaves of a book then in the parlour, but, during the deceased's life, never mentioned her having so done; that after the deceased's death the paper was found in the book by Mr. Round, and that it is now in the same condition as when put into the book. [No other testamentary paper, and no other part of the mutilated duplicate could be found.]

7. Pleaded the endorsement on the envelope and also the word "mine," written with pencil on the outer sheet of the will, to be in the deceased's hand-writing.

8. Pleaded uninterrupted affection and regard for her nieces: that they constantly visited the deceased when they were in London: that either Mrs. John Round, or Mrs. Bouchier, visited her daily during her last illness, (the two other nieces being out of England,) and were by her directions admitted to her bed-room; and the deceased told Matthews, "that she wished Mrs. J. Round to come daily."

9. Pleaded undiminished friendship for Miss Roberts, the sole executrix and residuary legatee; that the deceased corresponded with her, and sent her presents of money and other tokens of regard; that Miss Roberts, for several years prior to and till August 1817, resided with the deceased, and afterwards visited her for a few weeks in each year.

The evidence entirely sustained the allegation.

*Phillimore* and *Lushington* for the Executrix.

The *King's Advocate* and *Dodson* for Mrs. J. Round and Mrs. Bouchier.

*Addams*, and *Haggard*, for Mrs. Green Wilkinson and Mrs. Rolt, cited *Pemberton v. Pemberton*, 13 Ves. 310. (See *Colvin v. Fraser*, 2 Hagg. 266.)

JUDGMENT.

SIR J. NICHOLL.

What, upon the face of the instrument, are the sound legal construction and presumptions? Suppose that the mutilated instrument alone had been found and that no duplicate had ever existed. This mutilation of the first sheet, leaving the signature untouched would not be a total revocation: it would be a revocation of those particular devises only, (*Larkins v. Larkins*, 3 B. & P. 16); but there being two papers both in the deceased's possession, the presumption at law would be, that by the preservation of one duplicate entire she did not intend a revocation of these particular devises, otherwise she would have mutilated both duplicates. The construction then to be put upon this act of mutilation (for it clearly appears to have been her own act) is, that, at most, it was a preparation for a projected alteration, to which she had not finally made up her mind; or which she had abandoned; and therefore she preserved entire the duplicate which she had always retained in her own possession and on which she had written the word "mine."

If upon the face of the paper any doubt could arise, the extrinsic circumstances detailed in the evidence concur in establishing this conclusion. She did not mean to revoke altogether, for she continued to the

end of her life on the most affectionate and confidential terms with Miss Roberts, the executrix and residuary legatee. Many of her letters for years past are exhibited, some a few days only before her death. She did not mean to revoke the devises to all her nieces, for those who were living continued to her death on the most affectionate terms with her, the two in town going daily or twice a day to sit with her during her last illness. At the time of the preparation and execution of the paper she was very firm in her intention, and resisted the applications of Mr. Dance to vary the disposition. The mutilation therefore done in this fanciful mode, could only have been some thoughtless experiment of a projected alteration, which probably did not involve an alteration of all these devises, but only of the wording and description of the nieces, rendered desirable by the death of one of them, and the marriage of the others subsequent to the execution of the will: but whatever the object was, she seems to have abandoned it and to have abided by the original duplicate instrument, the possession of which she retained.

Upon the whole I pronounce for the will: but as the act of the deceased made it necessary to take the judgment of the Court, the parties are entitled to their costs out of the estate. (See *Lambell v. Lambell*, infra, 208.)

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DEAN v. DAVIDSON.—p. 554.

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*On Motion.*

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After the case had stood over some time for further information, the Court, on securities justifying, granted to a residuary legatee administration, (with a will of 1801 annexed,) on affidavits that the party went to Demerara in 1802, and had not been heard of since 1804, that his mother, who died in 1826, believed him to have died many years before, a bachelor, and without a later will,—and that diligent inquiries had been lately made at Demerara, but without obtaining conclusive evidence of his death.

JAMES DAVIDSON, the sole executor in the will of Thomas Dean, having been cited by William Dean, a first cousin of the testator and one of the residuary legatees, to accept or refuse probate, or show cause why administration, with the will annexed, should not be granted, appeared to the decree, and on the 2d Session of Hilary Term, 1829, set forth his petition;—that the testator formerly resided in Paternoster Row, but in December 1803, sailed for Demerara, and left his will, dated the 17th of July 1801, in his possession: that from the time he left Engand, he, Davidson, had not had any communication with, nor received any information respecting him, save that in 1828 William Dean had showed to him a letter written by the testator, and dated, Demerara 1804; that he, Davidson, has no sufficient means of forming a belief whether Thomas Dean be living or dead, and therefore submits whether he ought legally to be called upon according to the decree.

To meet this petition an affidavit was brought in by Mr. Bundy, stating that he had married the mother of Thomas Dean; that since 1804, no letter nor communication had, to his knowledge, been received from him; that a report had reached England of his death, but that his mother did not make any inquiries respecting him, and that she died in 1826, and believed her son to have died a bachelor, and without having

left a will of a later date than that of 1801, executed about the time of his coming of age. Two affidavits were filed by William Dean, one stating, that in 1828 he caused inquiries to be made in that part of Demerara where the deceased had last been heard of, and that some documents and information of the death of Mr. Dean had been received in 1829; but as they did not effectually establish the identity, a further letter had been sent for more particulars, which, up to April, 1830, had not been furnished. The other affidavit stated, that a bill in Chancery had been filed by certain parties claiming under the will of Thomas Dean, that the deponent was made a defendant, that Davidson had appeared to the bill, and that a reference would be made to the Master to report as to whether the said Dean was dead or alive: and that to obtain affirmative evidence of his death, the deponent had used the greatest diligence.

The cause stood over from time to time upon the exhibition of these affidavits; the Court having intimated that if no further evidence could be procured, it should presume the testator to be dead; (a) when on this day, the death of Davidson being alleged, the administration, with the will annexed, was granted to William Dean: but as the testator might possibly not be dead, the Court directed the securities to justify.

An application was then made by *Lushington* for the costs incurred on behalf of Davidson; which was opposed by the *King's Advocate*.

The Court, after ascertaining that the costs did not exceed 10*l.*, allowed 5*l.* nomine expensarum.

(a) See *Doe v. Griffin*, 15 East, 293. See also *Doe v. Jesson*, 6 East, 85. 3 Bac. Abridg. 369. *Doe v. Deakin*, 4 B. and A. 433. 1 Jac. I. c. 11, s. 2, as to bigamy. 19 Car. II. c. 6, as to leases for life.

### CONYERS v. KITSON.—p. 556.

On a petition respecting the grant of administration, the asserted widow having married, during the deceased's life time, another man (since convicted of felony,) had a daughter by him, and continuing to cohabit with him, the Court granted administration to the sister, and condemned the widow in costs.

THIS question respected a grant of administration between a party asserting herself to be the deceased's widow and the sister and admitted next of kin. There were also five nephews and nieces, infants, who were entitled in distribution: they were not before the Court. The interest of Charlotte as the lawful relict of the deceased was confessed by the Proctor for the sister in an act of Court. The property did not exceed 2500*l.*, and was invested in the funds. The cause was argued on petition and affidavits.

*Lushington* and *Addams*, for the sister.

*Burnaby* and *Dodson*, contra.

Subsequent marriage is no bar. *Webb v. Needham*, 1 Add. 494.

JUDGMENT.

SIR JOHN NICHOLL.

Laurence Conyers died on the 10th of April, 1829, intestate, and the question is, to whom administration of his effects shall be granted, whe-

ther to Charlotte Conyers, otherwise Moorey, claiming to be his widow, or to Anne Kitson, admitted to be his sister.

The statute (21 Hen. VIII. c. 5.) directs administration to be granted to the "widow or next of kin;" leaving it therefore open to the Ordinary to grant it to either: and though usually a preference is given to the widow, yet it has always been held, and repeatedly been decided, that the widow may be set aside and administration, at the discretion of the Court, be granted to the next of kin.<sup>(a)</sup> This discretion however (like all other cases of judicial discretion) is not to be exercised arbitrarily and capriciously but on reasonable considerations,—it is the *boni viri arbitrium*.

In the present case some doubt is raised whether the asserted widow ever was legally married to the deceased,—whether, at the time of the marriage, she had not another husband living: but as there was a fact of marriage, the Court would *prima facie* be disposed to regard her as the lawful widow. Her original name was Perfect; she was first married to a person of the name of Thompson, and supposing or asserting him to be dead, she was in March, 1815, married by banns at Leeds to the deceased, then an apprentice and a minor: but she was described as Charlotte Thompson, *spinster*—not *widow*.

Conyers did not long continue to cohabit with her, but enlisted as a soldier, went to Canada, and there remained till his death in 1829. Charlotte—whether Perfect, or Thompson, or Conyers, did not long continue without a husband or asserted husband; for, on the 11th of November, 1817, she was married to Thomas Moorey, by the name and description of Charlotte Perfect, *spinster*. Her identity is not called into question. With Moorey she has ever since cohabited; and they keep a public house called the Black Bull, at Pontefract, and have a daughter residing with them, who is about seven or eight years old, and is acknowledged as their child. This Moorey had the misfortune to be convicted of felony in April last, and to have suffered six months' imprisonment:<sup>(b)</sup> yet the Court is asked to place the property in such hands.

These facts, then, which are not disputed, are quite sufficient to govern the discretion of the Court. Without entering into the validity of her marriage with the deceased—into her previous character, or subsequent conduct—into what were the deceased's grounds of withdrawing from her—what reasons she had to suppose him dead when she married Moorey—what her subsequent character or conduct has been—what is the good repute or ill fame of the Black Bull public house—without these considerations, her marriage to, or connection with, this now convicted felon,—be that marriage valid or that connection only adulterous—is quite sufficient to justify the Court in exercising its discretion of setting aside her claims to the administration as widow, and in preferring those of Mrs. Kitson as the sister. Against Mrs. Kitson's character

(a) In *Sayer v. Sayer*, administration was granted by the Prerogative Court to the son—acting by his guardian: the administration was prayed by the widow. She appealed. 3 Sept. T. T., 1713, the Court of Delegates held, that the Ordinary had discretionary power in granting the administration, either to the widow or next of kin; and that a minor, acting by his guardian, is within the statute, and equal to a major.—See also *supra*, 83, note (a), and *Lambell v. Lambell*, *infra*, 208.

(b) In the act on petition it was stated, on behalf of Mrs. Conyers, that Moorey was convicted *en* having unsuspectingly purchased a small quantity of oats, which were afterwards proved to have been stolen.

nothing is said in the act on petition, but one single affidavit (and that a strange one) is offered to impugn it: while there are several affidavits exhibited in support of her fitness and respectability. To her, therefore, the administration must be granted, but she must give justifying security.

There have been a great number of affidavits exhibited, apparently prepared in the country; some of which are quite irrelevant, and might well have been spared. This woman's application to be entrusted, as a fit and proper person, with the administration in the character of the deceased's widow, even supposing her to be legally entitled to that character, was, considering her *de facto* marriage to, and connection with, Moorey, a bold and rash attempt. Her claim to share in the effects must be established in a different mode; with that the Court at present has nothing to do: this is merely a question who shall have the administration, and does not involve an inquiry into the validity of the marriage. But, being of opinion that her perseverance in pressing her claim to the administration was perfectly unwarrantable, I am bound to condemn her in the costs of the present petition.

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In the Goods of FREDERICK STABLES.—p. 560.

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*On Motion.*

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When, after the death of a brother administrator, administration had been revoked, because the mother had not formally renounced, that revocation rescinded on the mother's affidavit that she was aware of her son's application for the administration, and had under it received her distributive share.

FREDERICK STABLES died in 1815, a bachelor, and intestate, leaving a mother, and several brothers and sisters. On the 26th of August, in that year, letters of administration of his effects were granted by this Court to his brother Henry, described in the administration, "as the natural and lawful brother, and one of the next of kin of the deceased." At the time this administration was taken, there was no formal proxy of renunciation by the mother; she however was perfectly aware of her son's application for the letters of administration, and from time to time received her proportion of the intestate's effects.

Upon the death of Henry Stables, the administrator, it was proposed that the two surviving sisters should take out an administration *de bonis non*, and, the mother having executed a proxy of renunciation as well in respect to the original administration, as to the *de bonis non*, the sisters in December last applied for the grant, when the original administration was revoked before a Surrogate, on the ground that the mother had not formally renounced previous to the issuing of that grant. To obviate the necessity of administering again to the full amount of the deceased's (F. Stables') property, *Haggard*, on the above circumstances, and upon the affidavit of the widow, moved the Court to rescind the revocation of the administration, and to decree a *de bonis* grant to the surviving sisters.

*Per Curiam.*

As the mother was cognizant of and virtually renounced the original

grant, I think the former revocation was unnecessary: let it be rescinded and a grant de bonis pass as required.

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In the Goods of ELIZABETH DARLING.—p. 561.

The Court being bound to satisfy itself that the applicant for an administration is entitled to the grant, great delay in applying, by raising suspicion, justifies it in calling for explanation.

*Per Curiam.*

A CIRCUMSTANCE occurred two days ago which the Court feels bound to notice, because it is connected with a subject important both to the profession and to the public at large. Important to the profession, because it relates to the rules according to which the passing of common form business is regulated; and the profession will better understand and more readily give effect to those rules if the reasons for which they were made are explained: important to the public, because it much concerns them, 1st. That every facility should exist in obtaining grants, and 2ndly, that such caution and guards should be interposed as afford security against improper grants. It is the object of the Court to provide for both these results; but the difficulty consists in combining them.

Representations have frequently been made as well by public bodies—the Bank, the South Sea Company,—as by private individuals—in respect to the facility with which grants are obtained—that a party has only to come forward and swear that an individual is dead, and that he is the next of kin, and thereupon immediately obtains the administration. They have accordingly urged the necessity of making some regulations to restrain this facility: nor is it extraordinary, where hundreds of millions pass under the grants of this Court that the necessity of caution should be strongly felt (a). Proposals at different times have been made that the death, and that the party claiming was next of kin, should be proved, first by affidavit, and secondly, of the one fact by certificate of burial, and of the other by certificates of marriages and baptisms. Various other modes of providing against frauds have also been suggested. To require, however, in every case proofs of this sort, would be productive of such an inconvenience and expense to the public, and such an interruption to the passing of probates and administrations in common form, as would far more than counterbalance the advantage to be thence derived in the additional security against fraudulent grants, which bear an extremely small proportion to the total number of grants issuing under the seal of this Court: at the same time the Court has always said, “show exactly the evil to be guarded against, and a remedy which will not, by imposing extraordinary inconvenience on the public, be an evil greater than that sought to be avoided, and the Court will readily adopt such remedy:” and I will now state that if any rule made by the Court should in practice be found inconvenient, or any other regulation more convenient or effectual could be suggested either by a

(a) The probates and administrations, issuing out of the registry of the Prerogative Court of Canterbury, during the years 1828, 1829, and 1830, were:—

Total number of grants . . . . .	30,543.
Total amount of effects . . . . .	£128,723,362.

single practitioner or by any body of practitioners, and subsequently be laid before the Registrars to be submitted to the Court, every attention and consideration will be given to such suggestion.

On the principle of combining facility with security, the Court has made some regulations. For example, the time of the death is required to form part of the oath, and to be inserted in the margin of the probate or administration. The reason for this is, that if the time of the death has long past it becomes reasonable that some inquiry should be made why the grant was not sooner taken out; the delay raises something of a suspicion requiring explanation. By noting the time of the death on the margin, debtors to the estate, whether public bodies, as the Bank, or private individuals, have their attention directly drawn to it and are enabled more easily to ascertain that payment is made to the right person. This regulation produces little or no inconvenience, and has given great satisfaction: the effect of it having, as represented to me, been found by the Bank of England and South Sea House to be extremely beneficial. The Court has also publicly mentioned, and desired it to be understood in the registry and in the profession, that it looks for precaution both to the practitioners and to the public office.

On application to any Proctor to extract a grant, it is his duty, if there be any matter requiring explanation, to obtain that explanation of the party, in order to satisfy his own conscience and the inquiries of the public officer,—why, for instance, if there has been a considerable lapse of time the grant was not earlier applied for. It is the duty of the clerk of the seat, before he forwards the business, to require that explanation of the Proctor, in order that he may be enabled to state it to the Registrar. It is the duty of the Registrar, when the grant comes before him for signature if he sees any thing requiring explanation, to refer to the clerk of the seat, and to ascertain whether the difficulty has been removed: and thus, and by inquiry of the Proctor (if necessary) to satisfy himself that the grant may properly issue. If the explanation be not satisfactory to the Registrar, he is either to stop the business on his own discretion, or to apply to the Judge for his directions. Thus, if each party discharges his duty, it is almost impossible that any improper grant should pass; nor should any trouble be considered too great that leads to the efficient discharge of a public duty. It is quite obvious that these precautions are necessary, and (a statement of the principles on which the regulations on this subject are founded, having, as satisfactory to the practitioners, to the Clerks of the seats, to the Registrars, and to the public at large, been thus publicly made,) the Court feels confident that every respectable intelligent member of the profession will readily and strictly pursue the directions of the Court.

I will now state the case that has given rise to these observations. An administration was brought for the Registrar's signature; the party applying was described as the natural and lawful son and one of the next of kin; the deceased had been dead eleven years, a widow with more than one child,—in a remote part of the kingdom, (Bankhead, Durham,) and left property in value exceeding £450, and under £800, and yet no administration had been taken out for eleven years. This was exactly the sort of case in which inquiry ought to be made, and as the party himself was on the spot there could be no difficulty in obtaining the necessary information. The case might be perfectly fair, and, if so, the explanation could be easily furnished: or it might be false and fraudulent,



and might originate in one of those circular letters which have been sent all over the kingdom. Again, the person applying, the son, might be just come of age, and might without the knowledge of the other children or of their guardians be endeavouring clandestinely to get possession of this money.

It is true, in a case of recent death, if a party swears that he is one of the next of kin the grant would issue without inquiry as to the knowledge of the other next of kin. But there is this distinction between the two cases,—where a death has recently occurred the attention of all the parties entitled to the representation would naturally be alive; they would either take out the grant themselves; or expecting such a grant to be applied for by others would, if they thought it needful, take measures to protect their interests: ex. gr. if a next of kin whom they deemed unfit for the trust applied, they might show cause why the Court ought in its discretion to prefer one of the other next of kin, or might take care that the sureties were substantial. So if a fraudulent grant were applied for, speedy detection must almost certainly result from the attention which at such time is specially directed to the deceased's affairs. On the other hand where a long interval has occurred between the death and application for a representation, the parties interested have frequently no reason to suppose that any such grant is in contemplation, and their vigilance therefore is not roused. In such cases surprise is as possible and as much to be guarded against as immediately on the death, when the law provides against it by directing that no administration shall issue within fourteen days from the decease.

In the case now under consideration, the Registrar observing the nature of the grant asked for some information. When however the solicitors were applied to, they sent to the Proctor a letter bearing date on the same day, complaining strongly of the prejudice to which their party was exposed by the unwarrantable delay thus interposed, declining to account for the circumstances why the administration had not before been required, and intimating, that as the statute was imperative on the Court to grant administration to the next of kin without regard to lapse of time, and as their client had come up 300 miles, they should apply to the Court of King's Bench for a mandamus. I have no reason to doubt that these gentlemen are respectable Solicitors, and thought they were acting according to their duty to their client, nor do I presume to express an opinion as to what that duty might be.

The statute of administrations, it is true, directs that administration should be granted to the next of kin, but it does not prescribe the mode by which the Court is to satisfy itself that the party applying is the next of kin, and is really entitled to the grant: the Court must be governed by circumstances, as to the measures it shall take for that purpose: but no one can doubt that in order to afford protection to parties really entitled, and to guard against fraud, it is bound to obtain that satisfaction. The Court will not be deterred from discharging this duty by any threats of applying for a mandamus; and I feel fully confident that, if such application were made, the Court of King's Bench would not only reject it, but would highly approve of the course that has been taken. The Court can have no wish but to do its duty, and the Registrar would not, under the directions he has received, have done *his* duty if he had passed the administration without explanation. Undoubtedly, less delay would have been incurred if the solicitors had at once afforded that

explanation, than has already been occasioned by their refusal to furnish it in the first instance. Any inconvenience that may have resulted to their party from the delay, is mainly attributable to that refusal.

An explanation however was yesterday offered: the Proctor, in a letter to the Registrar, from which it appears that he knew nothing of his client, enclosed a letter to this effect, that there had been heretofore no occasion to take out this administration, inasmuch as the property of which the deceased was possessed and for which this administration was applied for, consisted of a reversionary interest not payable till the death of a Mrs. Anderson, and that she died only a short time since.

Who the writer of this letter may be (for he is not one of the solicitors' firm) the Court is not aware. The reason assigned, if properly verified, would be satisfactory; and probably, if offered in the first instance to the Registrar, would have been accepted without further verification: but the objection originally shown to giving the explanation increases the difficulty; I think now that this letter ought to be verified by affidavit, and that the Court would not act with due caution if it accepted as sufficient a note of an unknown person. I feel quite confident that the solicitors, after due consideration of the extreme caution necessary to be observed in granting probates and administrations—which furnish the handle to millions of property,—will see the advantage of the regulations established, and of the necessity of the care and precaution used in the registry. The danger is and the complaints are on account of the too great facilities afforded, and not of any unnecessary obstructions interposed in the passing of grants.

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LAMBELL v. LAMBELL.—p. 568.

A will found in the deceased's repositories with the seal cut off, is to be presumed to be cancelled by himself *animo cancellandi*, and can only be revived by some further act. Costs out of estate. Administration to the widow refused.

THIS was a cause of granting administration promoted by the widow against the deceased's brother William, sole executor and residuary legatee named in a will, formally made and bearing date on the 10th of January 1820.

The allegation, for the brother, pleaded Lambell's death on the 14th of November 1830; that his property was about 700*l.*; and that he left a widow, a sister, and two brothers: that in 1822 he went to reside in a lodging in Guernsey, where he died suddenly. That in 1816, suspecting his wife of dishonesty and infidelity, he separated from her, after which she lived in London; that his dislike to her (to be proved by declarations, and a memorandum in his hand-writing, annexed to the allegation) continued till his death. That he was under particular obligations to, and had a great affection for, his brother, William, and in July and August 1830, declared he had made his will, and left him the bulk of his property: that on the day after Lambell's death, his papers and goods were taken possession of by the Crown officers of the island, and sealed up; but that between the death and such possession, the papers were accessible to his landlady and to a lodger, who suggested, that the deceased had, by word of mouth, given them his property: that on the 26th of November the will was found, by the Crown officers, in a tin

case, of which the lid was loose, deposited in a private drawer of the deceased's bureau : that the seal of the will was cut off; and that some words, at the foot of the will, in pencil, were in the deceased's hand-writing; but that none of the deceased's friends know to what they referred, or when or by whom the excision took place.

The *King's Advocate* opposed the allegation.

*Addams*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

The will propounded has on its face the seal torn off. The attestation clause declares that it was signed and sealed, and the seal is cut off. The will was found in the deceased's repositories; it is in ink; but, at the foot of it, are written in pencil, admitted to be in the deceased's hand-writing, the following words, which confirm the presumption that the cancellation was his own act: "Your dishonesty to me *have* caused me to do this. J. L." It is said that this memorandum may apply to his wife, who is "cut off with a shilling." At all events, however, the will being in the possession of the deceased, and found after his death in his repositories, the presumption is, that the cancellation was the act of the deceased *animo cancellandi*, and that, by that act, he intended to render the will null and void. It is said he might have torn off the name and done some act more effectual: but this is the common mode of revoking. (See *Boughey v. Moreton*, supra, 70, in notis.)

Having revoked the will by this act it can only be revived by some other act; the circumstances pleaded can at the most raise suspicions and conjectures: it would be extremely dangerous to trust to declarations: besides he might have subsequently cancelled the will under some mistaken offence against his brother. The property is small; and the Court cannot suffer the parties to expend the whole in fruitless litigation. I shall reject the allegation, and allow the costs out of the estate. (See *Roberts v. Round*, supra, 198.)

Upon the application of the *King's Advocate*, for administration to pass to the widow, the Court said:—The grant is discretionary; and as the widow lived separate, I decree it to the brother. (See *Conyers v. Kitson*, supra, 202.)

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### SHADBOLT v. WAUGH and Others(a).—p. 570.

The presumption being that a will when executed contains the deceased's final intentions, to authorise an alteration on the ground of mistake, there must be 1st, an ambiguity in the paper; 2dly, clear proof of the omission.  
Allegation pleading omission rejected.

J. CROWDER died on 30th November, 1830. His will contained in six sheets of paper, was regularly executed and attested, and dated on the 14th of February, 1830. Of this will he appointed his brother, who survived him only two days, residuary legatee, and Mr. Shadbolt and two other gentlemen, executors. The present allegation was offered

(a) One of the parties claiming as a legatee was a feme covert, living apart from her husband on her separate property. The Court, on security for costs being given, accepted her sole proxy.

with a view to furnish evidence to the Court that certain bequests (one of a leasehold house in Woburn Place to Mrs. Waugh) had by oversight been omitted by the testator in giving instructions for his will. The bequests were in a paper of memorandum or instructions (registered No. 3,) from which he had dictated, but declined to show to the solicitor who drew, his will. The will itself was prepared without a previous draft. Declarations subsequent to the execution of the will, that he had disposed of his property in conformity with the paper of instructions, were pleaded; and it was also alleged that the testator gave the paper itself to his housekeeper to keep in order that she might know how he had disposed of his property.

*Addams*, in opposition to the allegation, cited *Lady Bath's* case, 3 Phill. 434.

The *King's Advocate*, contra, referred to the case of Mr. Baron *Wood's* will, 3 Add. 232.

JUDGMENT.

SIR JOHN NICHOLL.

The question in this case is in some degree a question of law. There are instructions or rather memoranda for the deceased's own use, and containing certain bequests which are not inserted in the will; and the question is, whether the Court can pronounce that the bequests omitted form part of the will. To admit this allegation would be to go much beyond all former principle and precedent, and would be extremely dangerous. The necessary presumption is, that at the time of the execution the paper contained the deceased's final intentions.

The deceased is pleaded to have had one side affected by paralysis, but that otherwise his health remained good till the last year of his life. In February, when his will was prepared, he was ill; and it is alleged that his eye-sight was "extremely defective:" but the papers, written by the deceased after the execution of the will, show that this statement is not warranted; and No. 3, the document from which he dictated his will, is written in a very small hand; so that, if he at that time suffered under such a defect of sight as is alleged, he could not have read it. To admit then such alleged omissions to proof, requires some clear evidence in the deceased's hand-writing; as, for instance, in Mr. Baron *Wood's* case. There the omission was palpable, and the instrument was in his own hand-writing: the subsequent calculations also in his own writing, proved the intention to demonstration; and the clause was in that case inserted. Here the evidence would only amount to something whereon to found a conjecture; and there is, as the will stands at present, a residuary clause under which the property in question would pass.

The will, regularly executed and attested, was written in the testator's presence and from his dictation, clause by clause, from memoranda previously prepared by himself; and yet, because his sight was defective, and one side had been affected by a paralytic stroke, it is to be supposed that he omitted by oversight the whole of these bequests. After the preparation the will was read over to him and was subsequently executed. If the Court were to interfere with such a will, what testamentary disposition would be safe? But the matter does not rest here;—the deceased keeps the paper by him four or five months; it is then opened; he has an abstract made; he compares the first and second sheets with the abstract, and the rest is read over to him by another person; he talks of making alterations, and he does write some further

memoranda for instructions; but these do not apply to the alleged omissions.

Now an attempt is made to introduce the clauses in the paper of memoranda, under a suggestion that they were omitted by oversight. Whether it was by oversight or from intention, is bare conjecture and mere probability: it may not be improbable that they were overlooked in dictating the will; it may be possible that the non-insertion escaped his observation when the will was read over; but that is not sufficient. It would be dangerous in the extreme to allow alterations in an instrument, so executed, on parol evidence and declarations. In the cases that have taken place the evidence has been quite demonstrative; and it has always been required, 1st, that there should be some ambiguity in the instrument itself; next, that the proofs of the omission, or fraudulent suppression, should be clear beyond all doubt (*a*). Here the utmost to which the plea brings the case is, that a mistake is not improbable. The Court must shut the door against such an attempt; and, upholding the principles hitherto acted upon, I shall reject the allegation.

The Court allowed the costs out of the estate.

(*a*) See *Draper v. Hitch*, 1 Hagg. 678. [1 Eng. Eccl. Rep. 289.] *Harrison v. Stone*, 2 Hagg. 537. [4 Eng. Eccl. Rep. 204.]

### WHEELER and BATSFORD v. ALDERSON.—p. 574.

The will (executed eight years before death) of a woman, who, though guilty of excessive drinking and great extravagancies, managed her own property, received her dividends, did various acts of business, corresponded rationally with her friends, and was not shown to be under any delusion, cannot be set aside on the ground of insanity; and though such will—in total exclusion of distant next of kin (with whom she had quarrelled)—be in the handwriting of, and executed at the office of, her attorney (one of the executors and residuary legatees to a great amount, he and his family having also very large legacies,) and the attesting witnesses speak to a bare execution; documents in her own handwriting, showed both capacity and knowledge of contents, though not mentioning the residue, will supply the additional proof required by such circumstance.

In a case of perfectly sound mind, and free from any suspicion of imposition, evidence of bare execution is sufficient; but where the deceased's attorney is the drawer of the will, and the person principally benefited, the jealousy of the Court is excited, and demands more than proof of bare execution.

Delusion has been generally laid down as an essential constituent of derangement. Semble, that insanity has never been held to be established in any case where delusion has at no time prevailed.

Semble, that a lucid interval then exists when the mind is apparently rational on all subjects, and no symptoms of delusion can be called forth.

Where clear and decisive insanity has been established at a prior time, acts of a doubtful character are of more force in proof of its existence at the time in question: and even subsequent decidedly insane acts may reflect back on acts otherwise equivocal; but when no decided acts, prior or subsequent, are proved, equivocal acts, however numerous, will not establish insanity.

Intoxication is temporary insanity, ceasing with the exciting cause.

Witnesses speaking to transactions and conduct spread over many years, and not to specific facts fixed by time, place, and circumstances, are apt honestly to describe occasional extravagancies as constant and perpetual habits.

Where no fixed and settled delusion is shown, and consequently no decided actual insanity, and extravagant acts are accounted for by the excitement of liquor, while at times the mind was sound; in order to avoid a will it must be proved that the deceased was so excited by liquor, or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to such act.

ELIZABETH MORICE, late of Gainsford street, Horsleydown, died on the

10th of March, 1830, a widow aged 65 years, leaving a will dated 2d July, 1822, of which Henry Wheeler and Charles Batsford were executors and residuary legatees. This will was opposed by Mr. Alderson, second cousin and one of the next of kin, and was propounded by the executors.

An allegation pleaded on the part of the executors, that in 1820 the deceased requested Batsford her solicitor, to make her will and to be one of her executors; a few days afterwards she brought to his office instructions (A), dated 25 April, 1820, all in her own writing; that on Batsford reading them over to her, she suggested various alterations, of which he made memoranda, (B); that on 7th May, 1820, she wrote him a note, (C); that a draft of a will, (D), settled by counsel was read to her; previous to which Batsford abstracted the names of the legatees and the amount of the legacy to each on the back of B; that the deceased having stated the amount of her property in the funds, which at the then price was upwards of 30,000*l.*, and the specific legacies amounting only to 22,300*l.*, she directed the legacy of 2000*l.* to Francis Daniel, since deceased, to be made 5000*l.*; Batsford made the alteration in the draft, and interlined the memorandum in paper B; that a will engrossed from such draft was afterwards executed, and remained in her possession till she destroyed it on the execution of the will propounded. That in 1822 the deceased delivered to Batsford E, as part instructions, and also verbal instructions as to alterations in the will of 1820, declaring that she meant to leave to Batsford 20,000*l.*; and to Wheeler 10,000*l.*, and to give them the residue; on Batsford's objecting to the inequality of these legacies, she acquiesced in leaving 10,000*l.* to each; she also directed other alterations, and Batsford in her presence made a memorandum of the legacies to him and Wheeler, and of the other alterations. That F was a letter from Mrs. Morice to Batsford. That a draft will (G) was drawn up; on being read over to or by the deceased, she directed Sutton's legacy to be contingent on his being in her service; a legacy of 500*l.* each to be given to Woolley, her butcher, and Watts, her cheesemonger; and her jewellery to Mrs. Batsford; the preparation and execution of the will on the 22d July, and capacity: that soon after, Batsford at her request delivered to her, a copy of her will (H), which on the 22d of April she gave to Wheeler, having previously herself made therefrom an abstract of the legatees and legacies (I), which she kept, and was found the day after her death, in her pocket-book.

The nature of the case, set up in opposition to the will, and of that set up in the rejoining allegation, may be gathered sufficiently from the Judgment.

The testamentary papers referred to in the executors' plea, were as follows (a):—

(a) The following additional testamentary papers were in the course of proceedings brought into the registry.

A paper of the 29th of March 1820, (which had been torn to pieces,) all in the deceased's writing, agreed with paper A, except that it omitted the legacy to Davis, and gave 1000*l.* each to his two sisters: it omitted the legacy to Brickenden, but gave to Watts 500*l.*, and appointed Daniel sole executor: there was no residuary legatee.

An unexecuted will of January 1817, five guineas to Davis; legacy to Harris in blank; to Knoller in blank: Brickenden and Mr. Ching five guineas each: Miss Daniel 5000*l.*, her diamonds, plate, &c.: her three servants 25*l.* *per annum* if in service: Daniel sole executor and residuary legatee.

In the draft of this will (dated December 1816), the legacy to Harris was first 200*l.* *per annum* then changed to 5000*l.*, and to Knoller first 200*l.* *per annum* then 1000*l.*

## A.—In deceased's writing.

This is the last will and testament of me Elizabeth Morice of Gainsford Street in the parish of Saint Johns in the county of Surry widow being of sound mind and good understanding bodily health do hereby revoke all other wills codicils whatever in the name of God Amen—I

These two papers were drawn up by a lawyer. The alterations in the draft being in Dr. Daniel's writing.

A will of the 27th of September 1816, Sarah Cook 50*l.* per annum, Mrs. Aldridge 2000*l.*, Harris 5000*l.*: Miss Daniel residuary legatee, Daniel and Aldridge joint executors with 5000*l.* each.

With this will was brought in the following note:—

DEAR SIR,

September, 16, 1816.

I will give you a call on Wednesday next in the morning, as I wish you to *git* two witnesses to sign a paper which I shall bring with me. With best respects to Mrs. Aldridge from your sincere friend.

ELIZABETH MORICE.

I will make you smile at a trick I was *plyd* on the day of the funeral, which I found out by chance.

(Superscribed) Thomas Aldridge, Esq. Howard Street, Strand.

A will of the 31st of July, 1815, Mrs. Lockhart 50*l.* per annum, Harris 200*l.* per annum, Knoller 100*l.* Dyne sole executor and residuary legatee.

A codicil (not in the deceased's writing) dated the 31st of August 1816, (the day of Dyne's funeral,) substituted Miss Dyne for her father.

A will of the 22d of February 1813, Mrs. Lockhart 500*l.* stock, Davis 500*l.*, Wilson and Mrs. Wilson—her servants—100*l.* each, if in service; Harris 200*l.* per annum; Dyne—sole executor, residuary legatee, and devisee.

A will of the 24th of April 1810, Mrs. Lockhart 1000*l.* after her father's death, Mrs. Brocklesby 500*l.* do., Mr. Gideon Fournier, her father, universal devisee and legatee for life, and Dyne sole executor, and substituted residuary devisee and legatee.

A will of the 6th of September 1809, Mrs. Lockhart 500*l.* after her father's death: her father universal devisee and legatee for life; and Humphrey her attorney, and Davis, joint executors and substituted residuary devisees and legatees.

\* The wills of March 29, 1820, and September 1816, were of the deceased's writing: and both as to the style of expression, and form of the clause of attestation, coincided with A: the former, like A, was signed, but not attested: the other was signed and attested. The other executed wills were not in the deceased's writing, but they were formally drawn up and executed; and did not refer, but the will of 1817 and its draft did refer, to her connexion with the Newton family, and to her burial at Grantham.

Letter No. 1. 1830, 4th March.

Mrs. Morice's respects to Mr. Jackson, much obliged to him for the milk, but as he is so short of milk and eggs, she will not trouble him for more at present, but she longs for the jar of new honey he promised her a fortnight ago. She is as bad as she can be to be alive: but if he can call early on Friday morning, as she has received so many favours, she requests him to accept a legacy of one thousand pounds of money after my decease, and the pictures. Come early, I wish much to see you.

(Addressed) John Jackson, Esq.

MORICE.

Mrs. Morice Best Regards to Mr. Jackson and begs his acceptance of the enclosed for past favours.

\* \* The note (on stamp) enclosed was as follows:

Gainsford Street, London, March 1830.

1000*l.*

On demand I promise to pay Mr. John Jackson one thousand pounds For value Recd—after my decease.

to Mrs. E. MORICE

Gainsford Street

Horselydown.

Mrs. E. MORICE.

(Endorsed)

JOHN JACKSON.

A deed, executed by the deceased, of the 24th of May 1813, transferred to Aldridge and another as trustees 1000*l.* Bank Stock, and 13,000*l.* five per cent. to pay the interest to her for life, and on her death the principal to Dyne, if he survived her; if not, the interest to Mrs. Dyne for life, and after her death the principal to her daughter.

The deed recited that "a friendly intercourse had long subsisted between the deceased and Dyne, during which period he had rendered such important services as had in a great measure secured the fortune and promoted the happiness and comfort of Mrs. Morice, who had not any relations then living, but such as were of a very distant degree."

The wills in favour of Dyne contained nearly the same recital.

first resign my soul to Almighty God who gave it—secondly it is my wish and desire to be kept one month in my *front parlor* Thirdly *tis* my wish and desire to be buried by no one but Mr. Thomas Burton in the church at Grantham in Lincolnshire with Doctor Newton's family Relict of Sir *Isick* Newton Fourthly I give to Francis Daniel Esq of Grove Cottage Mile End Green the sum of Two thousand pounds and I also give to Batsford Esq of Horslydown two thousand pounds—and I also give to Mr. Thomas Burton one thousand pounds—I also give to Mr Brickenden Surgeon the sum of one thousand pounds I also give to Mr Daniel *Harice* an officer at Union Hall three thousand and then to his wife after his death—Next I give to my present servants Sarah Cook John Sutton and his present wife if *liveing* with me at my Death one hundred pounds each for mourning to be paid them within one month and I also give them one hundred each a year for *there* life and to continue in my house as long as they live Furnished as it is now and all the taxes to be paid by my executors with all my common *close* to be divided between Sarah Cook and Mrs Sutton my best *close* to Mrs Harris and I also give to Ann Rowland Daniel of Mile End Green five thousand pounds with my plate and *Dimonds*. And I also *hearby* constitute and nominate and appoint the said Francis Daniel Esq and the said Batsford Esq executors to this my last will and testament Hereby revoke all former wills made by me at any time and declare this to be my last will and testament of me Elizabeth Morice April 25 1820 Signed sealed published and declared by me the said Elizabeth Morice as and for herself will and testament in the *presents* of us who in her *presents* and at her request and in the *presents* of each other subscribe our names as witnesses Elizabeth Morice

in a former will I left a Mr. Aldridge Five thousand pounds and his Wife two for her own use but now I exclude them both *Haveing* amply provided for them both in my lifetime all my *legacys* to be paid within three months after my death

Mr Thomas Burton is to be paid all my funeral expences and to have the one thousand pounds clear of any duty whatever and all the rest which I have to left any thing to

one thousand pounds to St Johns Charity School My fathers grave at Saint Johns to be kept in Repair and to be painted every year—and a monument is to be put up for me in the church of Grantham Lincolnshire

and one thousand pounds to Mr John *Davice* of Paradise Row Rotherhithe and after his death to be *devided* between is two sisters Mrs Anderson and Mrs Colson

B.—In Batsford's writing.

Sutton and his wife to be allowed to live in the house free of rent and taxes till their death

*Mr. Daniel's legacy to be 5000*l.* instead of two.* [This was interlined.]

The annies to the servants to be paid to them for their life only after their decease the stock to be divided bet the residuary legatees

The pictures to be divided bet the executors

The furniture to be divided bet the 3 servants at the discretion of the exors

The division of the cloaths to be at the discretion of the exors.

A pair of diamond ear rings to Mrs Batsford—the rest of the jewel-



lery of all descriptions and the plate to Ann Rowland Daniel—except as follows

The silver tankard formerly belonging to Sir Isaac Newton to Mr Batsford

The interest of £50 4 per cents to be applied in keeping Mr Fourniers monument in repair and in painting the same once a year

Residuary legatees to be the two executors (a)

C.—In deceased's writing, and superscribed CHARLES BATSFORD Esq  
May 7 1820

"Mrs Morices respects to Mr Batsford, Saying they had both forgot Mr Truscotts bill which was taken up of 23: 19: 11 therefore he cannot owe her Much if Mrs Batsford Will not be offended you May put down in the Will that money Which I have in the bank Stock in my name for herself for Pocket Money for her."

D.—A draft will of 1820 settled by Counsel.

E.—In the deceased's writing, except the part in brackets, which was interlined.

"I appoint Mr Henry Wheeler [*Hercules Court Threadneedle Street*] stock broker of Surry Square Kent Road my executor with Charles Batsford Esq (b) Mr. Daniel Harris five thousand pounds (c) at his death to his wife and at her death to be *devided* between his two sons Daniel and William 'Harris—to Mr Sutton two thousands pounds at } his death to his Wife and at her Death to her Daughter Ann Cook if } living with me (d)\*

to Charles Batsford Esq my house and all that is in it"

F.—In the deceased's writing, and superscribed "CHARLES BATSFORD Esq"  
June 24 1822

"Mrs Morices respects to Mr Batsford and as he will Not *Sett* himself down More than the other executor She desires and begs he Will *Sett* Mrs Batsford down Five thousand pounds for her own use and Two thousand pounds for Each of his Daughters—he May only mention Mr Harris for if he Dies before Mrs Morice then She Can mention Mrs Harris in a Codicil to her Will"

G.—Draft will of 1822—in Batsford's writing.

H.—Copy (in Batsford's writing) of will of 1822, delivered to Wheeler.

I.—Abstract of legacies in deceased's writing:—"Henry Wheeler Ten Thousand pounds to Charles Batsford Ten Thousand pounds to *Susanner* Batsford the wife of the said Charles Batsford Five thousand pounds to Susannah Batsford and Fanny Batsford the two Daughters of Charles Batsford two thousand pounds to Thomas Brickenden one thousand pounds to Thomas Burton one thousand pounds to Daniel Harris Police Officer five thousand pounds to John Sutton my *servent* two thousand pounds provided he shall be in my Service at the time of my *Deceisse* to John Davis of Rotherhithe one thousand pounds to the Trea-

(a) On the back of this paper were calculations in Batsford's writing of the amount of legacies in A. of the deceased's money in the funds, and of her Bank Stock.

(b) Ten thousand pounds to C. B. and H. Wheeler.

(c) Instead of the three given him in the will to the trustees.

(d) Two thousand pounds to John Sutton.

These memoranda were written by Batsford on the fly-leaf of E, opposite to the corresponding clauses.

\* The legacy marked by a brace was struck through.

surers of the time being of Saint Johns Female Charity School at Horsleydown one thousand pounds to John Woolley of Gainsford St. Butcher and James Watts of Gainsford St. Cheesemonger Five hundred pounds each."

The will of 2d July 1822 gave the pecuniary legacies as paper I. In addition it gave to Mr. Batsford her dwelling house with every thing in it: to Mrs. Batsford her jewels and 600*l.* bank stock; to the churchwardens of St. John's, Southwark, 5*l.* *per annum*, to keep in repair and paint annually her father's monument. It appointed Wheeler and Batsford, executors and residuary legatees. It contained the same directions as to her burial, funeral, &c. as paper A.

*Lushington* and *Dodson*, in support of the will.

The *King's Advocate* and *Nicholl*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

Elizabeth Morice, widow, died on the 10th of March, 1830, at the age of 65 years, at her residence in Horsleydown, leaving personalty of the value of 70,000*l.* Thomas Alderson and his two married sisters, the deceased's second cousins, were her nearest relations.

Her will, propounded by the executors and residuary legatees, and opposed by one of the next of kin, is dated on the 2d of July, 1822,—nearly eight years before her death, and gives various legacies;—among others, 10,000*l.* to each of the executors, 5,000*l.* to Mrs. Batsford, 2,000*l.* each to the two Misses Batsford, several considerable sums to her friends and tradesmen, and the residue jointly to the executors. At the time the will was executed, the residue did not exceed 1,000*l.* or 2,000*l.* but the property afterwards greatly increased. The will is in the handwriting of Batsford—the deceased's solicitor at the time it was made—and is attested by two witnesses, neighbours of the solicitor, casually called in; they were not privy to the instructions, preparation, or reading over, but merely saw the deceased subscribe, and had no reason to doubt her capacity.

Under such circumstances the advisers of the executors, thinking it necessary to plead more than the mere factum, have in the allegation propounding the will referred back to a will made in 1820, to instructions in her own handwriting for that will, to alterations made by her in 1822, and to various other documents also in her handwriting. On this first plea were examined the two attesting witnesses, and one other witness who speaks to the finding of paper I, one of these documents. The handwriting was admitted in acts of Court.

On the part of Alderson a long allegation sets up, first, a case of weak capacity, and secondly, insanity: on the first head, suggesting fraud and imposition, and on the other, legal incapacity. The second article contains the general description of the deceased,—“That she was from her youth a person of weak capacity and of deranged mind and intellect; that the general wildness of her countenance and the expression thereof, and her general appearance, manners, conduct, and deportment, were such as to denote that she was a person of weak and deranged mind and intellect; and as such and as an insane or crazy person, and as one who did not know what she was about, and was not in her right senses, and as incapable of doing any act requiring thought, judgment and reflection, she was at all times considered and spoken of and treated by medical men and by her family, relations, friends, and acquaintance, and that

she was frequently called "mad Miss Fournier, "mad Mrs. Morice," or "mad mother Morice."

The twelve following articles proceed to describe her general habits (at all periods from her earliest life to the day of her death) of extravagance and irrationality in her mode of dress—in her immodest behaviour—in her profaneness—in carrying loaded pistols—in playing with toys—in fondness for her cat—in exposing her person—in continual intoxication, and in various other acts which it is impossible to enumerate without reading the whole of this part of the allegation. (a) Of these acts, no particular time or place are specified; they are laid as occurring at all times and during her whole life. It was impossible therefore to negative, contradict, or explain any individual acts.

The allegation then pleaded some specific acts; that at her own marriage in 1795 she conducted herself as an insane person; that at the marriage of her servant, Mitchell, her behaviour was irrational; that in 1816 she offered marriage to a low man—Knoller; that for some years she associated in a strange manner with a Dr. Daniel and his daughter; that in 1823, having broken her arm, she was guilty of some violent and irrational conduct; and it also pleaded one or two acts subsequent to the execution of the will: and the 27th article averred, that she was subject to various delusions, which it specified (b). The plea further alleged, that in respect to the documents in her handwriting, they were written either from dictation or from drafts which she was made to copy; and as an instance of this an exhibit, No. 5, is annexed, and is pleaded to have been written by Batsford, as a draft from which the deceased might copy a legacy to her servant named Sutton. So that the deceased was not only insane, but the will was obtained by fraud; and no inference of her capacity is to be drawn from these documents, which were mere contrivances to give colour and effect to the fraud. On this allegation no less than sixty-nine witnesses have been examined.

In reply it was pleaded, that the deceased throughout her life was sane, was treated by her family and friends as sane, was in the uncontrolled management of her property, and in such management displayed judgment and prudence; that at various periods of her life she was engaged in acts of business which she conducted without the suspicion of derangement: the plea also alleged facts to show the probability of the disposition in respect to the legatees; and explained some of the specific acts, and exhibited a number of her letters written at different periods. In support of this allegation thirty-four witnesses have been examined.

This being the shape and substance of the case, it will be necessary to inquire:—

First, whether there is satisfactory proof that the will contained the mind and intention of the deceased at the time it was executed.

Secondly, whether that mind was sane or insane—capable or incapable of giving effect to such a will.

The deceased on the morning of the execution being at Mr. Batsford's

(a) The 13th pleaded, and it was proved, that on the floor of one of her drawing-rooms, there were at her death fifty-two bushels of coals, which she had from time to time carried there herself.

(b) That she believed imps were dancing about her; that her cat, Mungo, had been poisoned; that she had poisoned her husband; that Dyne and others had attempted to poison her; that she was afraid of being carried off; and that in June 1823, she pointed out a small hole in the wainscot, by which she declared thieves had entered and stolen all her wine.

office, the latter called in Mr. Greenwood, a surgeon, and Hughes, his shopman, who lived close by. On their arrival, the deceased subscribed and they attested the will: they believe the deceased was of sound mind; they saw nothing to excite suspicion, or to impeach her capacity or sanity. The transaction happened eight years before their examination: they have no recollection that the will was read over in their presence; nor is it very probable that such was the fact: they know nothing of its preparation nor of the instructions for preparing it. The whole effect of their evidence is, that the execution passed as a mere ordinary transaction of business; if, on the one hand, there was nothing to probe the mind of the deceased, nothing to ascertain how far it went with the act, and was free from any imposition or delusion, so, neither, on the other hand, was there any appearance to excite their suspicion either of fraud or insanity.

In a case of perfectly sound mind, and free from any suspicion of imposition, this evidence of bare execution would be sufficient; the law would infer the rest: it would infer that the contents were known and approved, and that the party intended to give them effect. Neither fraud nor the absence of sound mind is to be presumed: but in this case there are circumstances which excite the jealousy and awaken the vigilance of the Court—which demand something more than proof of a bare execution. The will was prepared by, and is in the handwriting of, Mr. Batsford; he was the solicitor of the deceased; she was alone at his office; he takes a very important benefit; he is joint executor; joint residuary legatee; there are large legacies to himself and to his family; there were therefore inducements to take advantage either of a weak mind, or of an insane mind, and to abuse confidence (a). The Court would therefore look for evidence that the deceased knew and approved the contents, before it entered more particularly upon the question of sanity. That evidence may however be fully supplied by the documents in her own handwriting—for that they are her handwriting is admitted. An attempt indeed, and considering the number and nature of the scripts, rather a strange and desperate attempt, has been made to show that these documents did not come spontaneously from the deceased; but were either copied by her from drafts, or written by her under dictation; and to establish that averment, an exhibit (No. 5)—found in the possession of the deceased, or at least among her papers—is annexed to Mr. Alderson's allegation. "To my servant, John Sutton, the legacy or sum of 2000*l.*, provided he shall be in my service at my decease."

This paper is averred to be in Batsford's hand-writing: on the other side however, it had in the first plea been alleged that the deceased, in 1823, delivered to Wheeler, the other executor, a copy of the will, which (script H) was brought in by Mr. Wheeler, annexed to his affidavit of scripts, before Alderson's plea was given: and in the executors' second allegation it was further stated, that on Sutton's leaving the deceased's service in 1824, Wheeler, by desire of the deceased, sent her a copy of the clause containing Sutton's legacy; that No. 5. was such copy, and

(a) "Where a deed is prepared by the person himself who seeks the benefit of it, without the intervention of any other person, that circumstance alone is sufficient to raise a suspicion of fraud; and the instrument is to be viewed with the greatest jealousy, because the person with whom he deals is thus deprived of the opportunity of any disinterested testimony on the subject, and for this reason, instruments obtained by attorneys from their clients are always viewed with extraordinary jealousy."—Per Lord Rodsdale, 2 Sch. and Lef. 502-3.

was in Wheeler's handwriting. Which account is true? The answer to this question will furnish a test by which to try the charge of imposition. There is not a tittle of evidence that the exhibit was prepared as Alderson's plea avers: but the averment is falsified; it is proved that No. 5, is not Batsford's, but that it is Wheeler's writing. Mary Morrill, the first witness on the conditit, proves that immediately upon the deceased's death, Wheeler produced a copy of the will. Sutton too, it is proved, left the deceased's service in 1824: but what is almost conclusive of the truth of the executors' account is, that this exhibit is a verbatim transcript of the clause in the will, and is not a verbatim transcript of any document in the deceased's handwriting. This disproves Alderson's averment that it was a draft given to the deceased from which to copy the abstract, paper I; and goes far to confirm the truth of the averment, (and that averment is not unimportant,) that the deceased had been in possession of, and had delivered a copy of the will to Wheeler in 1823: and also that she obtained this transcript from him in the manner alleged: otherwise, how could this transcript in Wheeler's handwriting have been found in the repositories of the deceased; and he be in possession of the copy of the will? This tends strongly to negative any practice of fraud and imposition, and to establish that a copy of the will was really left in the deceased's custody; which copy she afterwards delivered to Wheeler. That fact is further confirmed by the abstract of the legacies in her own handwriting (to which I shall presently advert); for unless she had for a time the copy of the will in her possession, how could she make that abstract?

Previous to a more particular notice of that abstract, I will examine what other documents there are to show that this will was the act and intention of the deceased.

The plea lays as the origin and substratum of the present will, that the deceased in 1820, executed a will giving legacies to Batsford and also to Daniel, and appointed them joint executors and residuary legatees, and also giving several legacies to the same persons as are benefitted by the present will: that in 1822 she departed from that disposition; and excluding Daniel and adopting Wheeler executed the present and destroyed the former will. It is unnecessary to detail all the other particulars of the transaction alleged in the executors' first plea.

The papers in the deceased's handwriting, and so admitted to be, are—First, those which relate to the will of 1820. Paper A, a sort of draft will dated 25th April, 1820, with subsequent additions in the deceased's handwriting, was the paper of instructions taken to Mr. Batsford wherefrom to prepare the will in question. The deceased had executed several former wills at different times; though this paper contains no express bequest of the residue, looking to her other acts, no doubt she intended it for her executors.

The next paper, B, is in the handwriting of Batsford, it contains further instructions; and both at the beginning and at the end of it mention is made of the residue. The exact day when the instructions were given does not appear: it was probably early in May, for though A is dated on the 25th of April, yet the deceased made several additions after the date was inserted. The probability then is, that it was not carried to Batsford till the beginning of May, more especially as the next document C, bears date on the 7th of May. C is in the deceased's handwriting. It refers to a matter of account with Truscott, against whom Batsford at

that time was employed to take legal proceeding on her behalf, and it further offers to Mrs. Batsford, as a small honorary legacy, some Bank Stock, of which it appears the deceased was possessed. D is the draft will of 1820, prepared after C was written: the only material observation that arises on it is that it was laid before an eminent counsel in the Temple, whose endorsement of approval is dated on the 11th of May, 1820; evidence to some extent that the deceased was not imposed upon by Batsford, and that there was no fraudulent contrivance, for there was no clandestinity nor extraordinary haste. The executed will is not produced, but that would naturally be destroyed when the new will in 1822 was made; and it is alleged that such was the fact.

Such in 1820 were the deceased's mind and intention. Daniel and his daughter were not at that time discarded, though the deceased, having become acquainted with Batsford as her professional man in 1819, adopted him in the will of 1820 as a partaker in her bounty. It is not necessary to inquire whether the deceased was wise or capricious or hasty in this change of disposition, though, looking at her history, it is difficult to say that it was unwise or irrational, or unnatural or improbable; but it is sufficient at present to show that it was the act and mind of the deceased; and there is nothing in these papers, in her handwriting, to satisfy me that either imposition or insanity taints the will of 1820.

In 1822 the deceased proceeds to make the will propounded by which the Daniels are altogether discarded, and Wheeler is adopted as the object of her bounty in conjunction with Batsford. The other legatees, all old friends, are nearly the same: but, in addition, two tradesmen—her butcher and cheesemonger—are given legacies.

Between 1820 and 1822 it would seem that the deceased had grounds for excluding the Daniels: they had borrowed money of her and could not repay it—at least the father could not: the deceased had only obtained his note of hand, and had had recourse to legal measures in order to recover the debt. Considering her history with the Daniels (to which I shall hereafter advert) it is not surprising that she should have discovered their views: the fact however that she broke off all connexion with them is rather a mark of her sanity and her strength of mind. Nevertheless she did not transfer the whole benefit to Mr. Batsford: she introduced as the participator in her testamentary bounty her stockbroker, Mr. Wheeler, who with his brother, as well as his father before them, had been employed for many years in managing her property; so far at least as to invest what she did not want; for she always went to the bank and received her own dividends.

There is no reason to suppose that Batsford suggested this substitution of Mr. Wheeler for Daniel; they were not acquainted with each other, nor is there any trace of a conspiracy between them: but Mr. Batsford appears to have acted fairly and liberally in declining to take a larger legacy than his co-executor and co-residuary legatee; and that Mr. Batsford's family take in addition large legacies, is the deceased's own act.

This brings me to the documentary evidence relating to the transaction of the will propounded. It begins with paper E. [The Court here read E.]

The new disposition, then, and the new executor come from the deceased herself. The legacy to Harris is increased from 3,000*l.* to 5,000*l.*

and Batsford takes an increased benefit—"the house and all that is in it." On the back in the hand-writing of Batsford, is "10,000*l.* to C. B. and H. Wheeler." There is no proof of the instructions for this clause or how it came to be inserted, except as it is explained in the next paper F. That paper, in the deceased's hand-writing, and dated 24th June, 1822, is a very important document. It affords full evidence of mind and intention: she assigns her reasons and is not to be diverted from her purpose: she also assigns reasons in respect to the bequest to Harris, showing that she fully understood the nature of a testamentary act, and the safest mode of carrying her wishes into effect.

These papers not only repel any appearance of fraud and circumvention practised on an understanding too weak to resist (a), but they furnish such proof of sound mind that nothing short of decisive, disqualifying insanity could defeat the testamentary effect of a disposition proceeding from such a mind and intention.

If more were necessary, there is still another paper in her own hand-writing of no inconsiderable importance, Paper I,—the abstract of the pecuniary legacies made by the deceased herself. It is quite correct, and exact in order and amount. It is alleged by Alderson, that the deceased was not in possession of the will after she had executed it: but H, the duplicate produced by Wheeler, the latter asserts on oath was delivered to him by the deceased in 1823, and No. 5, in Wheeler's hand-writing, was found in the deceased's possession—in her pocket book—at her death. How the deceased could have made the abstract I, except by having H in her possession as alleged by Batsford, no explanation has been attempted in plea or argument. The strong presumption and probability are, that it was an abstract taken from the will or copy: but be that as it may, the very circumstance of the deceased making the abstract, whenever made and however abstracted, is strong proof of mind,

(a) In *Bates v. Graves*, 2 Ves. Jun. 288, Lord Chancellor Loughborough says: "the issue devisavit vel non always implies in it, where the execution is not the point of the issue, a question of the capacity of the testator; that is, either his absolute capacity, or his relative capacity, where it is supposed the particular instrument was the effect of that undue influence, which necessarily implies a degree of weakness at the time, and quoad that instrument, making it not an instrument arising from the fair bias of his own mind, but from the exercise of that improper influence." See the case *passim*, particularly pp. 289. 292-3.

In the treatise of Equity, 5th ed., by Fonblanque, Vol. I. p. 68, et seq., is this passage: "Although there is no direct proof that a man is non compos, or delirious, yet if he is of a weak understanding and is harassed and uneasy at the time; or if the deed be executed in extremis; or by a paralytic; it cannot be supposed he had a mind adequate to the business he was about, and might more easily be imposed upon; (*Filmer v. Gott*, 7 Bro. P. C. 70. *Fane v. Duke of Devonshire*, 6 Bro. P. C. 137); especially the provision in the deed being something extraordinary, or the conveyance without any consideration. And the rule of the common law itself, in case of wills, is very favourable; although it can hardly perhaps be extended to deeds without circumstances of fraud or imposition. For a memory which the law holds there to be a sound memory is, when the testator hath understanding to dispose of his estate with judgment and discretion, which is to be collected from his words, actions, and behaviour at the time, and not from his giving a plain answer to a common question." (*Marquis of Winchester's case*, 6 Rep. 23.)

Mr. Fonblanque, in a note on the early part of this extract, says: "In *James v. Graves*, 2 P. Wms. 270, Lord Commissioner Jekyll seems to lay some stress upon the circumstance of a deed not being revocable as a will, and therefore liable to be set aside, if gained from a weak man by misrepresentation, and without any valuable consideration. But it appears from the case of *Fane v. Duke of Devonshire*, that though a deed obtained in extremis, and by imposition, do contain a clause of revocation, the principles upon which courts of equity proceed, will equally attach and entitle the party prejudiced to be relieved against it." In *Fane's case*, however, (see 6 Bro. P. C. 140,) one at least of these revocable deeds (for there were two of the same date) was not to operate during the life of the grantor: and would therefore seem to stand exactly on the same grounds as a will,—except as to the Court in which relief is to be sought.

memory, and understanding; that she fully knew the contents of the will and perfectly approved of the disposition thereby made. It is true that neither this abstract nor any other paper in the deceased's handwriting expressly makes a disposition of the residue, but I cannot entertain the slightest doubt that she fully intended the executors to have it, and it is given to the executors in some of the former wills.

The legacies themselves strongly tend to show that the will was the deceased's own act; and that neither were these legacies introduced to give colour to the main disposition: nor did the deceased fluctuate in regard to them. She had, as I have said, reason from the conduct of the Daniels to alter the disposition of 1820 in their favour—but she had none to depart from her intentions of benefitting the legatees. Brickenden had been her medical attendant many years, and had recently (1819) retired from business and removed out of the neighbourhood. Burton was an old acquaintance, a builder and carpenter; and she had always intended that he should bury her. There are letters from the deceased to him written both before and *after* the will, which not only render the legacy to him probable, but which show that the deceased was not a person of that habitual and uniform incapacity mentioned in Alderson's plea. I will read one of these letters:—

DEAR SIR

March 4, 1820

I wrote to you in my last I was going to Mile End for a few days but have been prevented by Truscott's business Mr. Batsford can do nothing without seeing you be so kind to see him on Monday he wants to ask you many questions and tell him all you know on the business I find Sir William Abdy must have a fine of six pounds in the first place and the stamps will be high and Truscott has gone from his word about paying all above ten pounds which was the *Burgon My Lawyear* thinks I can turn Truscott out I wish I could. Call on me when you have seen Mr. Batsford you will oblige me by asking Mr. Batsford what the expences will amount to *all* together that I may know what I am about—tell him what you told me that Sir William Abdy you thought need not be consulted—from your sincere friend

MORICE.

I shall see you on Monday evening

(Superscribed) Mr. Burton Flint Street Wallworth.

This letter, on a matter of business just before the will of 1820, is as rational as possible, and it is proved by other evidence that at that time a lawsuit was pending between the deceased and Truscott. It is impossible to say that the writer of this letter was not then competent. There is another letter also to Burton, about eight months after the date of the will propounded. It is in these words:—

DEAR SIR

February 6, 1823

Pardon my long silence in not thanking you for your kind present of the birds. I have not been able to put pen to paper before this day. I have kept my bed room almost ever since I came from the North which was on the 2<sup>d</sup> of November. I am happy to know where you live and hope you will always inform me as I hope no one will bury me when I am dead but you it was you know always my wish and I have left you handsome besides. Since I saw you I have had nothing but illness and did not think I should have lived till now I have often talked to Mr. Batsford of Horselydown Lane about you When I am better and get down stairs I shall be glad to see you I conclude with wishing you health from your sincere friend

MORICE



(Superscribed) Mr. Thomas Burton No 34 Edmond Street Southampton Street Camberwell.

This is an express recognition of the will in which she not only directs that Burton shall bury her, but also gives him 1000*l.* and desires that it shall be independent of the expense of her funeral. It shows too her intercourse with and confidence in Batsford. It is impossible to conceive a more rational, quiet, letter; it recognises the will and contains nothing sounding to folly: yet Alderson's case is, and his witnesses attempt to support it, that this woman was at all times insane. Harris (a police officer appointed by her father, who was police magistrate) and his wife kept up a continued intimacy with the deceased, and occasionally transacted matters of business for her. Letters to Harris and his wife of the same tendency as those to Burton are exhibited. Sutton lived eleven years in her service, he and his two wives in succession; the wives as servants on board wages; Sutton himself as a sort of guard and protector: but as they might quit her service, as Sutton in fact did in 1824, she made his legacy conditional, "in case he should be in her service at her death." Mr. Davis was a very old and confidential friend of the family; he used to call on the deceased every Monday to receive her directions as to any business she might wish him to transact for her. All these legacies were in the will of 1820; she was quite steady in respect to them—in 1822 she adds legacies to two of her tradesmen, both persons she had long dealt with and who were attentive in supplying her. The legacy to St. John's School, though it is pleaded that the deceased never gave away any money in charity, was not colourably suggested by Batsford; for it appears in both wills—it is in the deceased's handwriting in A, and the evidence of one of the witnesses, who applied to the deceased to subscribe to the school in her life time, proves that she declined so to do, at the same time declaring she would not forget the school at her death. The whole disposition then strongly confirms the presumption of law that the act emanated from the testatrix, and further that it was the emanation of a rational mind.

It will be necessary, however, to examine with more minuteness into the latter fact—her sanity; for though in considering the evidence, in order to see whether the factum of the will and her knowledge and approbation of the contents were proved, I have not altogether omitted noticing some of the circumstances which also bear upon the question of sanity, yet the Court is not warranted in concluding at once that there exists no possibility of *proving* insanity:—but it must be *proved*: the rule of law being well established that sanity is presumed till insanity be proved. The burthen of proof lies upon the party who undertakes, upon that ground, to defeat an instrument—be it will or be it deed.

It may be difficult and perhaps would be dangerous to attempt to define what is the essence of insanity. Delusion has been generally laid down as essential: that is, the fancying things to exist which have no existence, and which fancy no proof of reasoning will remove. Others may have said, that insanity may exist though no delusion prevail: whether this means that it may exist where no delusion ever has prevailed, or only where you cannot call it forth upon the particular occasion, is not so clear. No case has ever come under my notice where insanity has been held to be established without any delusion ever having prevailed, nor am I able exactly to understand what is meant by "a lucid interval," if it does not take place when no symptom of delusion

can be called forth at the time. How, but by the manifestation of the delusion, is the insanity proved to exist at any one time? The disorder may not be permanently and altogether eradicated—it may only intermit—it may be liable to return; but if the mind is apparently rational upon all subjects, and no symptom of delusion can be called forth on any subject, the disorder is for that time absent; there is then an interval, if there be any such thing as a lucid interval. It may often be difficult to prove a lucid interval, because it is difficult to ascertain the total absence of all delusion.

Where clear, decided, and undoubted insanity has been established to have once existed before the contested transaction, acts otherwise of a doubtful character may become of more force in proof of its existence at the time in question. Even acts decidedly of an insane character occurring after the transaction may reflect back upon acts, otherwise equivocal, about the time of the transaction itself, or on the general deportment of the party: but where there are no decided acts proved ever to have taken place; when all the acts are equivocal; when they may be attributed to other causes, to violent passion, to intoxication operating upon a mind naturally excitable, I am not aware that in any case such equivocal acts, however numerous, have been held to establish insanity.

The sort of case set up in this suit has been already in some degree described. Before adverting to the nature of the evidence adduced in support of it, I will briefly refer to the history and character of the deceased.

The deceased was born about the year 1765. She was the daughter and only child of Gideon Fournier, a police magistrate at Union Hall, who resided many years in Gainsford Street, Horsleydown, where the deceased died. The character of the neighbourhood of that part of the town is pretty well known. Her mother was fond of dress, and neither father or mother seems to have been very severe in their restraint of the daughter: she was a girl of rather a truant disposition; she liked to go to tea-gardens and such places of public amusement, and was not much controlled by her parents; nor was Horsleydown likely to produce society calculated to engage a young girl of strong feelings in a circle of mere domestic visits. In 1795, the deceased, then of the age of thirty, having about three years before declined the offer of a Mr. Bryant, was married to Morice—he was engaged as a clerk in a brewery; and though at first the connection appears to have obtained the sanction of the father, yet his consent having been subsequently withdrawn, the marriage was clandestine. A reconciliation, however, shortly afterwards took place, and the deceased and her husband went to reside next door to her parents. In 1805 Morice died; and the deceased in this cause from that time continued a widow. In 1812 the father (then a widower, for his wife died a year or two before) died; and after his death the deceased threw his house and her own into one, and continued ever afterwards to occupy both.

In 1808 the deceased had, under the will of her aunt, Mrs. Perrot, become possessed of certain property, some articles of which were in the hands of the Alderson family; she brought an action to recover that property, and obtained a verdict subject to a reference. In the course of that transaction the deceased made an affidavit, on account of which the Aldersons indicted her for perjury, and she was convicted. Upon the interposition of friends, particularly of a friend named Dyne, they were,

with some difficulty, prevailed upon not to bring the deceased up for judgment: but this transaction produced such an alienation that no intercourse ever afterwards took place between the deceased and the Aldersons. It is not denied that it was highly improbable that if she made any will the Aldersons would be benefitted. Any will made by the deceased in her senses would be adverse to the Aldersons—they stand not upon the deceased having any sane intention to benefit them, but upon their legal rights as next of kin, as they undoubtedly are entitled to do. They must, however, prove the deceased insane as they have alleged and undertaken to prove.

I have already said that the deceased was of a truant temper, of strong passions, and was never much controlled. It appears not merely by the depositions of witnesses, but by a memorandum-book in her own handwriting, that her mind was extremely vicious; her constitution highly lascivious and corrupt—not restrained by the modesty of her sex, nor brought into subjection by religious or moral principles. After the death of her parents, having a considerable property at her own command and disposal—living at Horsleydown—nearly fifty years of age—having no near relations, (for the Aldersons, her second cousins, were the nearest)—having no respectable society nor connexions—convicted of perjury—she gave way to her natural profligate propensities, and to the vices belonging to her passions, and among other things indulged in the frequent and excessive use of spirituous liquors.

The question then is, whether she became actually insane in the legal and correct meaning of the term insanity; or whether she was only guilty of those extravagancies of which a person of such a character and so excited would occasionally, or even frequently, be guilty. There is produced a cloud of witnesses—that is every witness examined on Alderson's plea—who gave unhesitating opinions that the deceased was mad: but their opinions are of little weight. A drunken woman in the streets excited by spirituous liquors, forgets the modesty of her sex, is guilty of every sort of extravagance, talks irrationally, is hooted and pursued and pulled about by boys, so that every person who sees her says,—“she is a mad woman” or, “she must be either drunk or mad.” There is hardly an act of which an insane person can be guilty which may not arise from intoxication. Intoxication is in truth temporary insanity, (see *Treatise on Equity*, c. II. s. 3, p. 67, 5th ed.): the brain is incapable of discharging its proper functions: there is temporary mania—but that species of derangement, when the exciting cause is removed, ceases; sobriety brings with it a return of reason.

Now the case set up is, that the deceased at all times and from her earliest life was deranged, was of unsound mind. Is that the truth of the case? Notwithstanding there is this cloud of witnesses to opinion and to certain acts, is the case set up reconcileable even with the documents in the deceased's handwriting already referred to? It is proper to consider how these witnesses are got together. I have already stated that the plea lays that all the acts enumerated occurred throughout her whole life and at all times. At the head of the sixty-nine witnesses is Miss Daniel, who after stating that she knew the deceased intimately from 1814 to 1822, thus deposes:—“During the whole of my acquaintance with her she was unquestionably of unsound mind and deranged: in speaking of her capacity I should not merely call it weak and slender, but distorted and vicious; her countenance was generally if not always

marked by an extraordinary wildness of expression, her manners, conduct, behaviour, and deportment were uniformly strange and eccentric—extremely so; and that indicated a deranged and unsound mind and intellect: they were such as to make me at all times and under all circumstances consider her as insane and crazy. I can safely and conscientiously say, that I never for one single hour during my acquaintance with her believed that she knew what she was about, or that she was in her right senses, or capable of doing any act which required thought, judgment, or reflection. I considered her more than insane—a decided maniac: she was always treated and spoken of by every person with whom I ever saw her, or by whom I ever heard her spoken of, as an insane and mad woman, and as having been out of her senses: the servants used to call her ‘mad Mrs. Morice,’ they used to say ‘here comes mad Mrs. Morice,’ and I have heard people in the streets point her out and call her ‘mad mother Morice.’”

This is the general account given by this witness; and on subsequent articles in support of these opinions she deposes to a multitude of acts so profane, so filthy, so obscene, so disgusting—many of them taking place not only in her presence, but in that of the witness’ own father also, that no general words can describe them, and the particulars of them are quite unfit to be stated. But what does the witness admit? That for seven years, she, a young unmarried woman of 25 or 26 years of age, and her own father, were the constant associates of this insane, disgusting person, borrowing money of her, she, the witness, repaying her, her father acknowledging by note a debt of 1,900*l.*, though now his daughter describes the deceased as so mad that she was incapable of any rational act. To describe the deposition of this witness is impossible, and if possible it would be unfit; it occupies sixty sides of paper. The Court forbears to express more strongly its opinion of her evidence. It seems highly probable that Mr. Alderson was induced to frame his allegation principally from the account he received from this woman.

I must next consider the course followed to get together the host of witnesses to prove this allegation. A room is taken at “The Ship in Distress”—a tavern at Horsleydown: there the witnesses attend and are entertained; they talk the matter over, a long bill is incurred, the landlord and landlady are two of the witnesses—Mr. Alderson goes there frequently, and carries his own claret there. How is the Court to estimate the degree of reliance to be placed on witnesses so got together and so brought forward? In the next place, even if there was no such cause to deduct from the credit of the witnesses, still the very nature of the plea forms a considerable deduction—they are not brought to speak to specific facts fixed by time, place, and circumstances, but to transactions and conduct spread over many years and which they describe as if constant and continuous habits. The will is made eight years before her death. If the deceased had been seen a few times guilty of extravagancies or indecencies in the streets, a witness would club them together in his mind without even meaning to depose untruly, and would describe the conduct as a constant and perpetual habit. It is only in this view that it is possible to reconcile the depositions of the witnesses not only with the adverse witnesses, but with the written exhibits. Many of the witnesses, from the tenor and tone of their depositions and from the inconsistency of their own conduct at the time with the account they now relate, convince me that they have given a very inflamed and exaggerat-

ed statement of the conduct of the deceased. Many others convince me that they have inferred and deduced a general habit from a few particular facts—some from merely conversing with each other on the conduct of the deceased. It is impracticable to wade through this mass of evidence, so as to assign reasons applying to each particular witness or to the facts which he relates, and to select a few would hardly afford more satisfaction. I will only notice one or two; I will take, for instance, the second witness—whose evidence immediately follows that of Miss Daniel—John Sutton, who lived in the deceased's house for eleven years—from 1813 to 1824: his two wives acting as her servants; his first wife died in her service, and on marrying again his second wife in like manner became her servant; she did not take alarm at the deceased for four years, for she remained there till 1824, two years after the will was made: Sutton says, on the second article:—

“I lived in Mrs. Morice's house near upon eleven years, I went there as high as I can guess in 1813 and quitted in 1824. I was no servant of hers, and never had any thing from her: my wives—both of them—were her housekeepers; and I was allowed to live in the house with them. When my first wife died, Mrs. Morice told me to look out for a good honest woman, such as I could recommend to be her housekeeper, and a neighbour of mine, whom I had known twenty years, I married in 1820, and we were obliged to leave Mrs. Morice in 1824: the deceased was not a clever woman at all, and I believe she was deranged during the whole time I lived in her house; she was not a raving mad woman, but I can say that she was positively mad,—not in her right senses for one single moment during the whole time I lived with her. I could tell such things of her as are scarcely to be believed: I always thought her a very strange looking woman, and I knew her by sight many years before I lived with her: it was not so much the wildness of her looks as her general appearance, her manners, her conduct (in doors and out, drunk and sober, and she was very much attached to liquor—but drunk or sober it was all one, she was always mad) were so strange that it was clear to any person who saw her, that she was quite mad crazy: I always considered her a lunatic altogether, and treated her as one: my present wife was obliged to leave her because she was quite afraid of her; and for that reason we left. She was spoken of as ‘mad Morice’ in the whole neighbourhood: the boys used to call after her ‘mad Morice’ and no wonder, seeing that as she walked about in the streets, she stopped and talked to fishwomen and prostitutes: they were the only fit company for her: no body respectable could have any thing to say to her.”

Such is his inflamed and exaggerated account: but he is a disappointed witness, for he expected a legacy, and I quite agree with him that he tells such things of her as can scarcely be believed—it so happens that above twenty of Mrs. Morice's letters, written to Mr. and Mrs. Dyne during four years of this very period—from 1810 to 1816—are quite rational letters touching upon the ordinary topics which would naturally occur, and are quite irreconcilable with the account given by Sutton “that the deceased was at all times drunk or sober, insane.”

I have already said, that it is in vain to select particular witnesses or to attempt to discuss each deposition. I am obliged to content myself with stating the impression left on my mind by the general result. The Court therefore can only declare generally, that the evidence, so far as

it is credible at all, does not, in its judgment, make out decided actual insanity; for no act is proved by credible witnesses which cannot be accounted for by the excitement of liquor. Even the acts which may have been produced by that excitement were not constant and habitual; those exhibits in her own handwriting, to which reference has been already made, showing, that at the times when they were written she was in a sound state of mind; and, above all, no fixed and settled state of delusion is proved by which the Court is enabled to say that at any one time or on any one subject the deceased was actually and essentially insane, so as to be legally incapacitated from disposing of her property either in her life-time or after her death.

Unless then it could be shown that at the particular time when the will was made the deceased was so excited by liquor, or so conducted herself in doing the particular act as to be legally disqualified at the moment from giving effect to such act, the case of the next of kin fails (*a*); still more does their evidence fail to establish satisfactorily that the deceased was at all times, or generally, a person of unsound mind.

But when the Court looks further, and examines the evidence produced by the executors, it has still less difficulty in arriving at the same conclusion. The Court has before it the whole history of the deceased's life: her various acts respecting her property—her various testamentary acts—the manner in which she was considered and treated by her family and friends—the manner in which she conducted herself when away from Horsleydown—at the Bank—on excursions into the country—with her tradesmen—all this corroborated by her correspondence at various periods of her life, and by an accurate private account in her own handwriting of the dividends she received during the very last year of her life. In 1792 Mr. Bryant pays his addresses to her—he receives a polite answer from her father, not declining the offer because he disapproves of the connexion, not because his daughter is unfit to contract marriage, but because she is not willing to accept it—because Mr. Bryant is not his daughter's choice. In 1795 she marries Mr. Morice,—they live together eight or nine years; and there is a letter from him, written while he was at Paris, in 1802, bearing every mark of being addressed to a wife who conducted herself with propriety, and signed “her loving and affectionate husband.” Her uncle, Mr. Newton, and her aunt, Mrs. Perrot, leave her very considerable property, and she becomes their legal representative. If they had considered her insane they would surely have taken a different course for her protection. In 1809 her nearest relations, the Messrs. Alderson, indicted her for perjury;—no great proof that they thought her insane. She takes every precaution to guard against the consequences of conviction, by assigning over her property and making preparations for emigrating to America. She disposes of several parts of her real estate. Mr. Mason, a highly respectable witness, has frequent and long interviews with her upon different transactions of business at that time; he speaks to her perfect sanity; so that it is not merely the formal acts of business themselves, but her conduct, deportment, and understanding, accompanying those acts to which he deposes. In 1809

(*a*) In *Cory v. Cory*, 1 Ves. 19, Lord Hardwicke was of opinion, that the drunkenness of one of the parties was not sufficient to set aside a reasonable agreement to settle disputes in a family, unless some unfair advantage were taken. But in *Cole v. Robins*, per Holt, Bull. N. P. 172, the defendant may give in evidence that they made him sign the bond when he was so drunk he did not know what he did.

she makes a will, giving her property to her father for life, and then to Davis and Humphreys, her solicitor. This will was made with reference to the prosecution for perjury.

During that prosecution Mr. Dyne had rendered her very essential service; she consequently makes a will giving every thing to her father for life and then to the Dynes. She also secures to Dyne a considerable sum by transfer of stock, she was however to enjoy the income for life. This was just after the death of her father, who (it should have been mentioned) died intestate and consequently he a man of business must have thought her competent to the management and enjoyment of his property. The will in favour of Dyne was adhered to till after his death in 1816. There are exhibited a number of letters to Mr. and Mrs. Dyne from 1810 to 1816 proving vanity and capacity beyond all dispute: the first is dated November 21, 1810, and is as follows:

MY D. MADAM

I am to thank you most kindly for the privations I have occasioned you by Mr. Dynes continual absence from his home on my concerns. Allow me to express my gratitude both to him and you for services the extent of which I cannot express, and to assure you both that I shall always keep in mind both your interests considering them as my own. I have taken the liberty of sending *trinkett* by Mr. Dyne for your Harriott as a memorial of my friendship and wish her health to enjoy it, and which though intended for her I beg may be at your disposal till you think it proper time to give it. With my father's best compliments

I am very sincerely yours,

ELIZABETH MORICE..

I am happy to say that by Mr. Dynes exertion I am now in possession of all my property.

(Superscribed) Mrs. Dyne, Ash, Farnham Surry.

This is just after she gets rid of the indictment for perjury; and there are above twenty letters, equally sane, written at intervals during a period of six years even till after his death. It is in vain to say that it was not wise to give so much to Dyne, that it was over-estimating his services, that it was a wasteful disposal of her property: she had been rescued from the effects of this indictment, from the supposed necessity of being an exile from her country, and her gratitude for that rescue absorbed her sense of all other services, and induced her to give the Dynes her whole property. Surely this offers no proof of insanity, nor raises any inference of fraud and imposition.

About the time of Dyne's death, if Knoller and Walker are to be believed, the deceased indulged in a good deal of profligacy. Knoller had rescued her from an assault of her servant, Wilson: Wilson was turned away, and in the will of 1815, Knoller has a legacy of 100*l.*—not a very extravagant reward for the service he had rendered her.

Comparing the evidence of these two witnesses, no very great reliance can be placed on either: for though Walker has not been a frequenter of "the Ship in Distress," there are some circumstances relating to her conduct not quite reconcileable with the account she has given of the deceased. It is not of sufficient importance to discuss it minutely.

On the death of Dyne—on the very day of the funeral—the deceased makes a codicil giving every thing to his daughter, but for some reason, or by some representation made to her, she in a very short time made a will favourable to the Aldridges and Daniels. During the period that

will was in force, viz. from 1816 to 1820, it is not improbable that the deceased was encouraged in her vicious propensities, and that advantage was taken of her habit of intoxication. A more profligate course of conduct than was pursued by Dr. Daniel and his daughter, as related by Miss Daniel herself, cannot well be imagined: but at length the deceased became sensible of their views—she employed Batsford in some matters of business the latter end of 1819 and beginning of 1820—she then gave the Daniels a smaller benefit, and she soon after made the will in question discarding them altogether.

To that will, made in 1822, and propounded in this cause, the deceased adhered down to her death—that is for eight years. If there were any trace that Mr. Batsford had been conducting himself towards the deceased, either in procuring this will or in inducing her to adhere to it, in the same manner that Ann Daniel describes that her father and herself acted towards the deceased for six or seven years, the Court would be warranted in imputing fraud and imposition to Mr. Batsford; but there is nothing of the sort: Mr. Batsford had no further intercourse with the deceased than became him and was necessary as her solicitor.

The deceased, from the execution of the will to her death, continues to conduct her own affairs; she goes to the Bank and receives her dividends; and the clerks at the Bank, and Mr. Wheeler, the brother of the executor, are examined, and give a full account of her conduct and behaviour, clearly evincing soundness of mind. It is hardly doing justice to the case to omit stating their evidence in detail, but I shall venture to forbear. It was her habit to make excursions into the country—either merely spending the day, or passing some months during the summer, at different watering places or making tours. She might at setting off from, or returning to, Horsleydown, choose to make a display before her neighbours, and have four, or even on one occasion, six horses, and be finely dressed, and lean forward in her carriage to display herself—she was a vain woman, and she held her neighbours in great contempt and liked to make an exhibition before them: but that does not amount to insanity. The landlord at the Tiger's Head, at Southend, proves the manner of her coming to his house to spend the day, and that she conducted herself with great propriety: and this—not upon one occasion, but for several years together, and several times in each year. The period spoken to by this witness, includes the time when the will was made. Again, a lady at Margate—who lets out lodgings which the deceased occupied for a month, and would have occupied a second time had they not been previously engaged—states: “During a month in July or August, 1820, a lady had lodgings (a bed room and parlour) in my house at Margate: I knew her to be the deceased; for she invited me to call upon her in Gainsford Street, spoke of Mr. Batsford, her attorney, of her mother's name being Newton, and of herself being a descendant of Sir Isaac Newton: she came first and looked at my lodgings, agreed on the terms for a month certain, and staid the exact time to a day: she came as a stranger, accompanied by her female servant. During that month I saw the deceased continually, several times a day, and seldom a day passed that we did not spend an hour or two together: she would send for me to sit half an hour with her after dinner; and we frequently walked together in the fields: she was a very conversable and pleasant companion, never conducted herself otherwise than rationally and sensibly, seemed a clever well-informed woman, always managed



the house-keeping herself, marketed herself, and gave directions how she would have the things cooked; put down the expenses in a book, and at the end of the month came to me of her accord, said she had agreed with me for so much, and paid me the exact amount according to the agreement. About six years ago (that is about 1824) she again came to Margate, drove to my house, and much wished to have my lodgings; but they were full, and she took another lodging: she staid there two or three weeks: she came for a month, but as she said she did not like her lodgings, she left before the time. During this period I saw a good deal of her; she would call in occasionally every two or three days for a few minutes' chat, and at other times, would stop more than hour with me: two or three times my daughter and I visited her at her lodgings; she always appeared a sensible woman, one that I should call a sharp woman—not to be deceived, and who looked after her own interest. On both her visits to Margate I had much conversation on different subjects with her, but I never knew her talk otherwise than perfectly rationally and sensibly, and she conducted herself like any other gentlewoman." As these visits were in 1820 and 1824, the witness was quite competent to speak to her capacity about the time of her will.

These are witnesses entirely aloof from all connection with the parties or the neighbourhood. It was not necessary, and it might have been difficult, to produce much evidence of this description, because if the deceased conducted herself properly at inns and lodging-houses she would not be remembered and could not be identified. It is not denied that the deceased did almost every summer make excursions to different watering places and different parts of the country entirely under her own guidance and management, and if she had been insane, and on these occasions acted as Mr. Alderson's witnesses state she did act at Horsleydown, she might have been recollected: but Mr. Alderson has not produced any evidence of any conduct of that description at any of those places, except from a servant picked up at Horsleydown and not alone entitled to implicit credit. There is no evidence that she omitted to pay her taxes or to receive her dividends. Here are a multitude of notes—above twenty—written by her after the will was made and to the last year of her life to different persons; yet no attempt has been made to show a word "sounding to folly" in any of them—and here is her account in her own handwriting with entries of the dividends received by her during the last year of her life not denied to be perfectly correct.

With this body of evidence tending to corroborate the general sanity of the deceased; her testamentary acts—her correspondence at various times and with various persons—her transactions of business spoken to by Mason—by the Bank clerks—and by these other witnesses, confirmed as they are by letters and exhibits, how is it possible that the deceased could be in that state of continual insane excitement imputed to her by Mr. Alderson's witnesses? And further, reverting to the evidence of the factum and to the scripts in her own handwriting, the will is in my judgment proved to be the act of a free and capable testatrix; and must be accordingly pronounced for.

Will established.

## ANTROBUS and ASHHURST v. LEGGATT.—p. 616.

A party entering a caveat, and alleging himself to be an executor in the last will of the deceased, without inserting the date; has a right to call for an affidavit of scripts, without swearing as to his belief that he is an executor in some paper left by the deceased; and s<sup>e</sup>mble, without being liable to costs.

FREDERICK BOOTH, by his will, dated the 28th of March 1831, appointed Sir Edmund Antrobus, Bart., and Henry Ashhurst, Esq., executors: they prayed probate, when an appearance was given for Horatio Leggatt, Esq., (for whom a caveat had been entered,) alleging him to be an executor named in the last will of the deceased, dated —, with certain codicils.—These papers were asserted to be in Mr. Ashhurst's possession. Both Proctors were then assigned to exhibit proxies and affidavits as to scripts. Mr. Ashhurst and his co-executor alleging they had not possession nor knowledge of any testamentary paper, under which Leggatt was either executor or legatee, applied to the Court to direct him to exhibit an affidavit as to his belief, that he was an executor in some testamentary paper left by the deceased, before an affidavit as to scripts was brought in by the executors.

*Dodson and Addams* for the executors. The original minute was informal, the date of the alleged will not being inserted; and if it had not been for an assurance on the part of Mr. Leggatt as to the existence of a will in which he had an interest, the minute would not have been consented to.

The *King's Advocate* contra. The assignation is quite in the usual form, and there is no instance of the enforcement of it being overruled. The practice is uniform.

*Per Curiam*.—Let the practice be followed.

The affidavits as to scripts were exchanged. No testamentary paper was annexed to Leggatt's affidavit, and it not appearing that he was either an executor or legatee; the Court was on this day moved to decree probate to pass, as prayed, and to condemn Leggatt to costs.

*Per Curiam*.

The Court decreed probate; but gave no costs.

## IN THE CONSISTORY COURT OF ROCHESTER.

### BRAMWELL v. BRAMWELL.—p. 618.

*24/2, 34.*  
Sentence of separation by reason of adultery and cruelty pronounced on proof of undue familiarities, clandestine communication, with frequent opportunities of guilt, and concealed correspondence by letters denoting great ardour of passion, if not allusions to actual guilt, (but no credible proof of a fact of adultery,) united with great violence of conduct and language, and an attempted blow.

On a suit for restitution the defendant must be compelled to return, unless it be proved that the plaintiff's inherent right is forfeited; but s<sup>e</sup>mble, less strict proof of cruelty or adultery is

necessary, in answer to such a suit, than where the party making these charges is the original complainant.

Condonation is a conditional forgiveness, on a full knowledge of all antecedent guilt. Less cruelty is necessary to revive condoned adultery, than to found an original suit.

THIS was a suit for restitution of conjugal rights brought by the husband: the citation issued on the 5th of August 1828, but was not served until the 10th of March 1829. A libel in the usual form having been admitted, a defensive allegation, with exhibits, on the part of the wife pleading adultery and cruelty, and praying a sentence of separation, was debated and admitted. A responsive allegation, setting up condonation, and exhibiting two letters from the wife, and also a second allegation on behalf of the wife, explanatory of the date of one of the letters annexed to the responsive allegation, were admitted without opposition.

The substance of these pleas, and the evidence in support of them, are detailed in the judgment.

The *King's Advocate* and *Haggard* for the wife.

*Addams* for the husband.

JUDGMENT.

DR. LUSHINGTON.

This case involves several questions:—

I. Whether there is any proof of adultery.

II. If adultery be proved, whether it has been condoned.

III. Whether, if condonation be proved, it applies to all the adultery preceding such condonation.

IV. If condonation be proved, whether the previous adultery has been revived by subsequent adultery.

V. Whether the cruelty proved be sufficient to found a sentence of divorce per se, or to revive former adultery.

It is to be remembered that the husband in this case commences the suit, praying that his wife may be compelled to return to cohabitation: and certainly he is entitled to the assistance of the Court, unless it can be shown that he has forfeited the right originally inherent in him. Where the wife is acting on the defensive, she is not relieved from the proof of necessary facts, yet, under such circumstances, the inferences, arising from facts when established, may be stronger than where she is the original complainant; thus where a suit for the restitution of conjugal rights is promoted by the husband, the wife is not, according to the practice and doctrine of these Courts, held precisely to the same strictness of proof.

The general circumstances of this case are shortly these: marriage in 1806; birth of one child—a daughter: and cohabitation for nearly twenty-two years: that in 1809 Elizabeth Jeffery—then about eighteen years of age—came into Mr. and Mrs. Bramwell's service as nursery girl; in 1816 accompanied her mistress to Tunbridge Wells, where Mr. Bramwell was under medical advice in consequence of a wound in his face; in 1817 was placed at Tunbridge Wells in the care of a house till it could be let; and in 1821 was fixed in the Castle Inn at that place—part of the property at Tunbridge Wells to which Mr. Bramwell was entitled in right of his wife, who was possessed of a considerable fortune. These are admitted facts: and it is not denied that an improper attachment had sprung up between Mr. Bramwell and Jeffery, nor that a clandestine correspondence, carried on between them, was detected by the wife in May 1826; but it was correctly argued, that the question still

remained—whether this attachment had ever been consummated by adultery. It may then be necessary to inquire, whether adultery is proved in any particular instance: or whether, though the particular time and place cannot be fixed, there is sufficient to satisfy the mind of the Court that adultery has been committed.

4. I. The charges commence in 1816, when Mr. Bramwell was recovering from his wound. The proof of guilt at this time depends entirely on the credit of one witness: the circumstances to which he deposes are not in themselves altogether incredible; and the story receives some confirmation from the subsequent intimacy of these parties, which necessarily reflects back on conduct of an earlier date. Still, antecedent to the transaction of which this witness speaks, no familiarity nor attention—nor any thing that can be regarded as the usual precursor of adultery—is established by distinct evidence, laying a foundation for this particular charge. 8. The occasion when, as it is said, this act of adultery took place is not in my opinion very probable. Looking then to this absence of probability, to the interval of time that has elapsed, to the manner in which this witness has deposed, to his acknowledgment of a quarrel with Bramwell, and to his charge that Bramwell had ill-used him, I come to this conclusion—that the evidence of this witness is, in the absence of all confirmation, much too questionable to be relied on, though I do not go to the extent of imputing wilful perjury; he may, in words, have spoken truly, but in substance his evidence is such as I cannot reconcile with admitted facts. I therefore proceed to the consideration of the next charge.

It is alleged that in the spring of 1817, while Jeffery had charge of the house at Tunbridge Wells, Mr. Bramwell passed a night at the Castle Inn, and that on that night only she had a bed at this tavern in a room nearly adjoining the one set apart for Bramwell, and opening into the same passage; that by his order the door of his bed-room was left open; and that on the night in question they slept together in her room. This is the substance of this charge, and it is proved that on the occasion referred to Jeffery drank tea with Bramwell, and, instead of returning to the house of which she had the care, remained during that night at the inn; and on the following morning her bed retained the impressions of two persons. These facts, together with the situation of the respective rooms, certainly lay a case of extremely strong suspicion—that on that night Bramwell and Jeffery slept together in her room. It certainly is very difficult for the Court not to arrive at that conclusion; and if the letters, on which I shall presently comment, had borne distinct reference to this particular period, and had been coupled with previous familiarities, I should not have hesitated in so doing: but this charge is coupled with no previous distinct familiarity, and, from its remoteness, subsequent familiarities cannot operate upon it retrospectively with any great force. 262. However strongly, therefore, I might be inclined, as an individual, to draw from these facts an inference of guilt, I hardly feel justified in my judicial capacity to pronounce that adultery was committed on this particular night.

No other specific act is charged till 1824. What however took place in the interval is extremely suspicious. The first circumstance powerfully affecting my mind is, that Elizabeth Jeffery—the nurse in Mr. Bramwell's family, a young unmarried woman, not in the slightest degree educated for such an occupation,—is put by Mr. Bramwell into the

Castle Inn, as mistress, in the year 1821 : and in this, and the two following years, he frequently went to Turnbridge Wells, passed several days at this Inn, and associated with Jeffery. The visits and intercourse are admitted ; but it is said they were the necessary result of business at Tunbridge Wells ; and that before Jeffery left Mr. and Mrs. Bramwell's service she was treated by them as a companion. Such are the excuses offered for the intimacy ; but improper familiarities cannot be justified by any supposed necessity for frequent intercourse ; and if the guilty inclination be proved, undoubtedly there was ample opportunity for gratifying a criminal passion. That such familiarities did pass between Jeffery and her landlord are fully established upon the testimony of three witnesses. Carpenter, then a servant at the Inn, proves that he frequently saw them standing by the fire in the bar, Mr. Bramwell's arm round her waist ; that on witness entering, they moved away and were confused ; that he has seen their faces close together as if they were kissing ; and in passing by Jeffery's bed room, has heard Bramwell's voice in the room, speaking loud and scolding her ; and on two occasions, in the morning, he speaks to seeing them both in his mistress's bed room, but dressed.

Mary Earl deposes nearly to the same effect, though perhaps a little stronger : she speaks to endearing expressions, and to kisses. Martha Wiles states, that she has seen Bramwell in her mistress' bed room ; but that, she adds, was on an occasion of her being ill : she also speaks to a kiss.

Unquestionably this is evidence of improper familiarity : and the witnesses depose to other circumstances which demonstrate a guilty attachment. I do not however entirely rely on their evidence, although nothing has been, or indeed can well be, urged to affect the credit of Carpenter and Wiles : but this undue and guilty familiarity between these parties is manifest from, and confirmed to its full extent by, the letters annexed to Mrs. Bramwell's allegation : they therefore require, before I state my impression of the whole case, a particular attention.

The first exhibit, to which I shall refer, is an unfinished letter, the discovery of which appears to have first raised a suspicion in Mrs. Bramwell's mind of her husband's infidelity. It is now admitted that this exhibit is in Bramwell's writing, and that the person addressed is Elizabeth Jeffery.

" My dearest Betsey, dearest of all women,

" Notwithstanding all y<sup>r</sup> promises y<sup>r</sup> heavenly and delightful promises I cannot submit to a partner a participator with me in those heavenly and lawful pleasures I have so long treasured up in store. Oh ! my dearest Betsey, think me not selfish, or that I do not feel for your situation, what you have gone through for me makes me feel selfishness to such a degree that to know or indeed even think that you should be embraced by another" . . .

This paper is found on the 2d of May, 1826, in Mr. Bramwell's room, and communicated to his wife, who immediately informs him of it by letter, which he thus answers :

" Borough, Wed<sup>r</sup> evening.

" My dear Wife

Y<sup>r</sup> letter I have just rec<sup>d</sup> and read, its contents does not in the least surprize as I have long seen by your conduct that your confidence in me pourtrays any thing but confidence. Yet I had hoped you had enter-

tained a much nobler opinion of me than I see you do. Am I indeed so fallen to be such deceitful wretch as I must be to have pen'd much less sent such a letter to any one? But I must to the point. Whilst me and George [his servant] was coming out of the Castle yard, Monday evening, George picked up a small wrapper of paper upon which I asked to look at: they appeared scrap of papers; on taking to the light I found something about 'My dearest Betsey' which name being familiar to me I was determined to take a copy of which I did and ret<sup>d</sup> the scrip again to George who can furnish you with them as I told him to keep 'em. When you have seen them you will then see how unjust you have been with me and how sincere I have been with you. If you had only paused for a moment my seeing Betsey that evening—what could I want to write to her I will take an oath I have not written to her this 12 mths or more I hope to be with you to-morrow when further satisfaction shall be given Beside to Betsey I can no more with kind love remain your affec<sup>t</sup>. but injured husband

"WILLIAM."

216. Is there one single syllable of truth in this letter? The counsel for Mr. Bramwell has avowed that the excuse for writing that paper is not founded in truth: nor was it without indignation that the Court observed Mr. Bramwell, in its presence and hearing, endeavour to induce his Counsel (who most properly rejected the suggestion), to persist in this falsehood. What, then, are the inferences from this conduct? "Where there is falsehood there is a strong probability of guilt concealed. The denial therefore that this letter was addressed to Jeffery shows that the expressions contained in it are not entitled to a favourable construction, but are proof of a guilty intention."

> Some discussion took place on the meaning of the word "lawful;" and it was urged for the husband that the expression referred to a promise of marriage at a future time: but the Court may omit this part of the case: it is not bound to find a sensible interpretation of any rhapsody this person may choose to write. I shall not then attempt to construe nor fix any definite meaning upon this expression "lawful pleasures:" but when I consider that this language is adopted by a married man professing an ardent attachment to a young woman, who had been the nurse of his child, the Court is at a loss to conceive what pleasures can under such circumstances properly be denominated lawful. I must then take this document as evidence of criminal attachment and intention though not of absolute guilt. The letter to Mrs. Bramwell, which the Court has also just read, shows the base hypocrisy of the writer, and to what falsehoods he would resort for the purpose of deceiving his wife: he avers that he has not written to Jeffery for more than a year, and yet the very next letter, annexed to the wife's allegation, and addressed to Jeffery, must just have been written by him.

"Borough, 3<sup>d</sup> May, 1826.

"MY DEAREST MY ONLY LOVE.

"Since I parted with you, I have done nothing but think of you. Oh how affec<sup>t</sup> I love you, every past recollection endears you stronger to me, and I now feel that we are as one, not even death could separate us, for to the grave would I cling to thee. when I think of your candid glorious and most true hearted explanation of Monday I could wet this sheet with my grateful tears. Oh every thing bespeaks that our long attachment has been cherished and cultivated by each other, and has emanat-

ed from the hearts core. It has nearly arrived to its height, when we shall soon see it bursting forth and see and feel the delights of sincere and genuine love. Could I but see you now methinks my ardour would scarcely allow me utterance of speech. You told me you thought indeed was assured I love you. Indeed you may and assure yourself this that from the first moment I felt to love you from that moment I felt to respect and to feel that sort of regard that I had never felt so for any other female, or indeed for any one on earth. And yet notwithstanding all this I know I have been and shown unkindness to you. But rely on this my dear girl, after having shown it it has immediately fled, and my whole soul and body wrapped up in the most tender and parental affection. Yes my dear Betsey believe me when I tell you that in the midst of all my unkindness that you might have thought me guilty of, the cause has been through my great selfish and ardent affection I have ever felt for you. After the beautiful explanation you have given to me I shall now endeavour to dispossess myself of self and substitute for it a treble gratitude with an increased (if possible) confidence as well as an increase of love and affection. My heart you have had for years, Indeed you have had it almost from the first time I saw you. But when I first press'd my lips to yours then I felt I was alive and you were then in complete possession, fond heart! It now appears and I have not the smallest doubt of it that our hearts are dedicated to each other and no earthly being can dissolve them. Be assured my dear love of this that I shall ever prize the possession of such a heart as yours. I will not only treat it nobly kind and affectionate but will and must ever think of it with tears of gratitude." After a few sentences on business, the letter proceeded: "I forgot to ask you my love about your cold—I hope it is much better and now nearly gone: pray write and let me know y<sup>r</sup> health is to me every thing my life my joy. I hope to be with you on Saturday. Should I not be able I will write, but pray write me if its only a line address Queens Head Borough. And now my dearest Betsey having nearly finished my letter I must conclude with my very best love and prayers for y<sup>r</sup> health. May we ever have the highest confidence in each other always assuring ourselves that no one ever can rival us in our love the wish and prayer of y<sup>r</sup> sincere friend warmly attached

"Most affect<sup>y</sup> yours

"W<sup>m</sup> BRAMWELL."

(Superscribed) Mrs. Jeffery Castle Tavern Tunbridge Wells.

Similar observations apply to this letter as those which I have already had occasion to make in commenting upon the first letter. This letter also comes into Mrs. Bramwell's possession; her husband ascertains this, and demands it with much violence; she refuses to deliver it up, hands it over finally to her daughter who conveys it out of the room, and thus secures it. Mr. Bramwell shortly afterwards succeeds in allaying the suspicions of his wife, and to induce her forgiveness and reconciliation writes the following document:—

"My dearest and beloved wife In the presence of Almighty God I here most solemnly swear and protest that I will never directly or indirectly have any connection or marriage with Elizabeth Jeffery late of the Castle Tavern Tunbridge Wells. Should the word 'connexion' not comprize every thing my dear wife wishes, I further add that I will not see the said Elizabeth again if possible neither will I ever carry on the least correspondence with her. W<sup>m</sup> BRAMWELL.

"Sunday 7<sup>th</sup> May 1826."

The expression "connexion" here used must have one of two meanings—either a criminal connexion and then the letter would be an admission of adultery; or an innocent connexion, and then it would imply no condonation by the wife.

Taking, then, these documents in conjunction with the familiarities proved (not the familiarities of long acquaintance, nor such as by any means correspond with what in the second letter to Jeffery are termed marks of "parental affection," but such as are the admitted consequences of a guilty attachment), and in conjunction with the fact that there were opportunities without end, are the ambiguous expressions referred to, to counterbalance all these other circumstances, especially when one of the defences is condonation—not a denial of adultery? If the evidence be liable to any doubt, by what rule am I to decide? By the existing probabilities—by coming to that conclusion on doubtful points which is in conformity with clear and established facts.

It is, then, in evidence that not merely was there a criminal attachment, but also that this attachment was not rejected; that Jeffery admitted his familiarity—received his correspondence—that opportunities were constant: and there is nothing to show on her part resistance, nor repudiation, nor that she at all discountenanced his passion. To doubt from such circumstances, that the consummation followed, would be to presume that the effect was not consequent on the natural cause; and that this was a case of extraordinary exception, and singular innocence. But the safer rule is to come to a decision in unison with the rest of the evidence; and I can entertain no reasonable doubt that adultery had been committed. To arrive at that conclusion it is not necessary to consider the evidence on the 9th article: the examination of that disgusting testimony may be spared; for I do not found any part of my sentence on Earl's evidence; though I do not say it is wholly discredited.

36. II. III. Condonation, however, has been set up: but this condonation is not only conditional in the eye of the law, as all condonations are, but it is specially so: and a question might arise, as in the case of *Durant v. Durant*, 1 Hagg. 733, [3 Eng. Eccl. Reps. 310,] whether at the time Mrs. Bramwell forgave the offences of her husband against her, the whole of them were known to her, for it was in that case, laid down by the highest authority, that condonation only takes effect upon a full knowledge of all the guilt. That Mrs. Bramwell knew of the adultery, at least to the extent proved, seems highly improbable. If it were necessary I think there could be little difficulty in showing that she was not aware of the whole, nor indeed of any part of it. Her letter of the 10th of May, 1826, (annexed to the responsive allegation,) makes it manifest to my mind, that she was not then acquainted with her husband's guilt (a).

(a) This letter was from Tumbridge Wells.

" V. Royal, May 10, 1826.

" MY DEAREST HUSBAND,

" It is now past nine o'clock and I have only just this moment rec'd your letter. I cannot tell you how my heart droop'd when I open'd the parcel and found no letter, or how it revived in about ten minutes after when John came up and presented me with one: ten thousand thanks for it, it has relieved my mind from a great weight. I have been but very so so since you left, not having enjoyed either sleep or appetite. Our dear child is indeed a comfort, and a dear good child to her mother. I shall sleep better to-night, I make no doubt, now I have heard from you. This is indeed a memorable day: this time twenty years I was a bride—your first and only love. That you will ever cease loving me I am not afraid of, or that an artful woman will succeed in



It is not, however, in my view of the case, necessary to inquire whether any part of this early adultery has been condoned; still less whether the condonation applied to all that adultery.

IV. For assuming that the condonation was complete, and extended to all the previous adultery, under what circumstances and on what conditions was it given, and what was the duty of the husband, and what was his conduct afterwards? He solemnly engaged to separate himself entirely from this woman, and if possible not to carry on the least correspondence with her: yet shortly after this Mr. and Mrs. Bramwell go to Epsom; and he clandestinely returns with Jeffery to Tunbridge Wells.

An attempt has been made to prove that Mrs. Bramwell's letter of 23rd. of June to Jeffery was written, as alleged by the husband, in 1826 (a). Taken alone and not in conjunction with other circumstances, expressions may be selected which may have that tendency. I have not the least doubt, however, that it was written in 1825, when I look at the contents of the letter of the 10th of May 1826,—in regard to which there is no doubt; when I compare that letter with this of the 23rd of June, it is incredible that Mrs. Bramwell could have so expressed herself—"I am not afraid that an artful woman will succeed in robbing me either of your love or good opinion. Oh! had I known or had an idea of the arts she has been practising against an open hearted grateful man, I would, reckless of all pecuniary consequences, have routed her out of the Castle long ago: but enough of the hated subject." With feelings thus expressed, it is in my opinion next to impossible that she could have written this letter of the 23d of June—five or six weeks only after an indignant charge against this very woman of an attempt to alienate her husband's affection, and wound her peace of mind.

But, how stands the evidence as to the date? Of Mr. Bramwell's allegation—that the letter was written in 1826—there is no proof; Mrs. Bramwell in her answers denies that it was written at that time: and

robbing me either of your love or good opinion. Oh! had I known, or had an idea of the arts she was practising against an open hearted grateful man, I would, reckless of all pecuniary consequences, have routed her out of the Castle long ago: but enough of the hated subject."

The rest of this long letter was unimportant, except in a few passages: e. g. "I trust you are doing all you can to get somebody to put in the Castle; for I cannot bear that girl (\*) should remain in it. . . . I trust after I have recovered from the effects of the shock and agitation I have gone through I shall regain my spirits. . . . I want you to remain here quiet for a little time; for quiet you will be now you have got rid of your tyrannical firebrand. . . . I hope you will give me and the dear child the pleasure of seeing you on Saturday. Believe me, my dear husband, your sincerely attached and most truly affectionate wife,

"FANNY BRAMWELL."

(Superscribed) "Mr. Bramwell, Queen's Head Inn, Borough."

(a) "MY DEAREST BETSEY,

"Will you come and sleep here to-morrow night? I understand from Mr. B. you leave the Castle to-morrow, and intend sleeping from it: if so I can only say here is a bed quite disengaged, and quite at your service, and I shall be happy for you to occupy it, and talk things over as well as to arrange things as to your future comfort. If you think I wish you otherwise than well (or ever have done) you wrong me, and do not yet know me; now the Castle is disposed of, there is little doubt but you will find me a firm friend, at any rate I shall expect to see you some time to-morrow, and in the mean time believe me your sincere friend,

FANNY B."

(Superscribed) "Miss Jeffery."

"June 23, 18" (†)

\* A younger sister of Jeffery's, who had since died.

† The remainder of the date was torn off.

Mrs. Bockett, the parties' daughter, in her evidence goes far to disprove it. When also I consider the secrecy with which Jeffery returned to the Castle in May or June, 1826, the improbability that this invitation was written in that year is increased. Nor does that date tally with the facts: the Castle Inn was not disposed of till August, 1826; and there is nothing to impeach the testimony of Mrs. Bockett, which almost amounts to conclusive proof that the letter must have been written in 1825, while a treaty was pending for the sale of the inn.

What was the conduct of Bramwell after his solemn declaration of the 7th of May, 1826? It has been properly admitted that Wiles (who had become the superintendent of the inn after Jeffery had quitted it) is a candid and fair witness: she states, "that, not long after her appointment, she was informed of Jeffery's return to the Inn; that Jeffery remained there for nearly a fortnight, confining herself almost exclusively to her bed-room and a small adjoining sitting-room, and that both Bramwell and Jeffery desired the deponent that her (Jeffery's) being there might be kept a secret from Mrs. Bramwell; that while Jeffery so remained secretly at the Castle, Bramwell often came to see her, and used to remain up stairs for a considerable time—sometimes as late as eleven at night." Can it be contended that this was conduct in conformity with Bramwell's solemn engagement? 'Here was not a solitary meeting, but meetings frequent, for a length of time, and purposely concealed from his wife. Is the Court to believe from the ingenious suggestions of counsel, or from the asseverations of the party that these meetings were merely to settle accounts? It is true Wiles states that she did see them engaged about accounts; but was it not Mr. Bramwell's duty to have been specially cautious that such interviews should not occur without information to Mrs. Bramwell, and should take place only in the presence of a third party? It is too much to ask of the credulity of the Court not to infer from this conduct a criminal attachment.

Wiles further states, that "about a fortnight or three weeks after Jeffery had quitted the Castle (after secretly remaining there as deposed) Bramwell arrived there in his phaeton on a Sunday night at about eleven. Afterwards, on that night, she was informed by Fanny Jeffery that her sister was up stairs; she did not go to see her; but knew that from that time meals were regularly carried up stairs for some one—not a customer—by Fanny Jeffery until the Friday week following, when Elizabeth Jeffery, about two o'clock, came into the bar and staid there till eight, after which the witness did not see her, and she believes she quitted the Castle: during the period aforesaid Bramwell was backwards and forwards at the tavern." What inference, then, can be drawn from this? And when it is likewise in evidence that Mr. Bramwell's servant, George, (who was also enjoined secrecy,) drives Jeffery one night, from Tunbridge Wells to the village of Hertfield; and that by these contrivances Mrs. Bramwell's inquiries as to Jeffery's return to Tunbridge Wells were rendered futile; I can arrive at no other conclusion than that this fraud and concealment are proofs of the husband's guilt.

Mrs. Bramwell, it appears, remained for some time with her sister; and was not reconciled to her husband till Biggs, a friend of Bramwell's, after an investigation declared, that there was no ground for her suspicions. Biggs, therefore, was not more successful in his inquiries than

Mrs. Bramwell had been, and probably from the same reason,—the studied concealment of the husband. If it be true that adultery was committed, then the former condonation, if such there was, does not cover it: and this reconciliation by Biggs is no condonation, because it takes place on the husband's averment of his innocence. I am satisfied that adultery did take place prior to the 3rd of May, 1826; and also subsequently; and that the effect of it has not been taken off by the wife's conduct.

V. I will briefly advert to the charge of cruelty. I take it to be acknowledged law as laid down by the learned Dean of the Arches in *Durant v. Durant*, that cruelty—to revive condoned adultery,—may be less violent in degree and less stringent in proof than when it forms the original charge. In my judgment that principle is quite consistent with reason: I subscribe to it not only from deference to the superior Court, but because I feel it to be most consonant to justice. I am bound to consider this conduct in reference to the husband's prayer, that his wife may be compelled to return home,—and with reference to the consequences of a non compliance with a decree of the Court made in conformity with such a prayer, viz.—excommunication and imprisonment.

Is, then, the cruelty, coupled with the proofs respecting adultery, such as will entitle the wife to her sentence? Undoubtedly, the evidence of the cruelty is not so satisfactory as it might have been; but if the witnesses lay a sufficient ground for the Court to conclude that the wife's return to cohabitation would be attended with a reasonable apprehension, or a probable danger, of personal violence, the Court will release her from the duty of such return. It is no answer to say, that witnesses, who have not been produced, might have been examined; for if the account before the Court be untrue, the husband might have called those other witnesses to refute the wife's case.

The averments in the 14th article require no very particular comment: they relate to Bramwell's conduct in May, 1826, when, with vehemence of language and force of manner, he attempted to wrest away from Mrs. Bramwell his long letter to Jeffery: but this article is not of such importance as the 21st and 22d articles. Upon the 21st Mrs. Bockett deposes to this effect:—"That in June, 1827, while she was residing in Easton Place with her father and mother, the latter was informed that Bramwell and Jeffery had been seen walking together, and that Jeffery was living near to them: her mother mentioned this communication to Bramwell, adding that she did not believe it after his solemn promises not to see Jeffery again: that Bramwell flew into a violent passion, stamped upon the floor, broke the bell-rope, dashed a chair against the drawing-room wall, knocked off the top of the witnesses' harp, used dreadful oaths, continued in a passion for a couple of hours, and caused both mother and daughter great alarm." On the 22d article she says, "in the afternoon of the 26th of January, 1828, while they were living in Tavistock Place, her father asked her mother for 50*l.*: she refused, saying, 'that he had had sufficient already, and she must have something for house expenses.' He was very indignant, and a violent scene ensued: deponent having observed, that her mother ought not to give the cheque, he directed his rage against her, struck her a blow as she was sitting, and used most abusive language, [which is detailed] to both: deponent and her mother prepared to leave the house; he swore that neither should; tore off his daughter's bonnet,

nearly strangled her with the strings, and crushed it to pieces: she attempted to leave the room; he forcibly held her back, and struck her several times: the people of the house came up stairs; he orders the street door to be locked, continues to swear violently at deponent, and to call her by opprobrious epithets. Mrs. Bramwell gets into the next house by the balcony, returns with two gentlemen; they, in vain, endeavour to reason with Bramwell: he aims another blow, which is warded off; and the witness finally escapes to her aunt's in Mecklenburg Square, where she is followed in two or three days by her mother, and they go down to the aunt's house at Epsom—Mrs. Bramwell's health being much affected." This is the substance of Mrs. Bockett's evidence on this part of the case; and, on the 22d article, her account is amply corroborated by the servant, Carpenter, who, on hearing a loud scream, goes up stairs with the landlord and landlady of the house, and speaks to what occurred afterwards.

Lab or  
2.  
1. The only provocation here was, a recommendation that the cheque should not be given: and it cannot gravely and seriously be argued that this would justify a husband and a father striking a wife and a daughter: this is direct cruelty: and can it be said that such conduct to the daughter is not cruelty to the mother? No such principle is to be found in the cases. Here is a wife who has discharged all the duties that belonged to a wife, with kindness, fidelity, and perseverance. After she was apprised of her husband's criminal attachment, she yet follows him to two prisons, and what is the return she meets with?—treatment both to herself and to her daughter quite unjustifiable. I am then to look whether I can pronounce that the wife could return to her husband in safety: that is the primary consideration in all cases of cruelty. I do not say that the cruelty is such as would entitle the wife to a separation on an original suit; but, coupled with the evidence of adultery, it is quite ample.

I have not adverted to the evidence of the two Emerys' on Bramwell's allegation, because I do not give any credit to it; nor to that of Cross, because it does not interfere with the sentence of the Court—that the wife is entitled to a separation from her husband by reason of his cruelty and adultery: and I accompany this sentence with a condemnation of the husband in all the costs.

Separation pronounced for.

## IN THE CONSISTORY COURT OF LONDON.

### CONWAY otherwise BEAZLEY v. BEAZLEY.—p. 639.

The *lex loci contractus* as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile; and therefore a second marriage, had in Scotland on a Scotch divorce (*à vinculo*) from an English marriage between parties domiciled in England at the times of such marriages and divorce, is null.

Quære, whether such divorce would be invalid if the parties were then *bona fide* domiciled in Scotland: still more, if that first marriage took place during a mere casual visit to England, both parties being at all times domiciled in Scotland?

In the absence of proof that registers of Episcopal Chapels at Edinburgh are by the law of Scotland documents of an authentic and public nature, copies thereof rejected as inadmissible by the law of England.

THIS was a cause of nullity of marriage promoted by Emily Frances Conway against Samuel Beazley by reason of a former marriage by him contracted. The libel, after pleading the marriage by banns of Beazley and Miss Richardson at Kensington on the 20th May, 1810, cohabitation and consummation, alleged, "that in consequence of disagreements Beazley, in 1813, withdrew from his wife's society, and on the 29th of August, 1823, a pretended divorce by reason of adultery having been obtained by Mrs. Beazley in the Commissary Court of Edinburgh, Beazley was on the 26th of July, 1824, married by banns in the presence of witnesses to Miss Conway, in St. Paul's Chapel, Edinburgh, according to the ceremonies of the church of England" (a); and exhibited a copy of the entry of such marriage "faithfully extracted from the register book of marriages kept by Mr. Marshall of Edinburgh, treasurer to the said chapel." (b) It then pleaded cohabitation in Soho Square, Middlesex, and that Mrs. B. (formerly Richardson) was alive on the 26th of July, 1824; passed by the name of Moggridge (c), and after having resided at Reading, died and was buried there in December, 1830.

*Addams* in objection to the libel.

A contract must be construed by the law of the country where it was made. *Holman v. Johnson*, Cowp. 341. *Robinson v. Bland*, 1 Black. Rep. 256. There is no exception in favour of a contract of marriage; *Dalrymple v. Dalrymple*, 2 Consistory Rep. 58. Erskine's law of Scotland, b. 1. t. 6. s. 23. But it will be said that by the law of England marriage is indissoluble, and therefore that the sentence of divorce in Scotland is void. *Lolley's* case will be relied on (d); the effect however of that decision is, as I apprehend, that if in the present case the second marriage had been contracted in England, it would be invalid: but in fact the second marriage was in Scotland. 244. 219.

The *lex loci* is valid except when it produces injustice, or is contra bonos mores: but can it be contended that a divorce, on proof of adultery, and a subsequent marriage are unjust or contra bonos mores? Such divorces and marriages are by the divine law allowed and sanctioned. By the older canon law divorce à vinculo was admitted: the Council of Trent however altered that law; but the authority of that Council is not admitted here. Till *Foljambe's* case (e), in the Star Chamber before Archbishop Bancroft, temp. Q. Eliz., divorce for adultery was à vinculo matrimonii: and in all acts of parliament on this matter, the language is uniform,—that the party has by his or her behaviour dissolved the marriage. No deceit nor fraud is charged: both parties acted upon the divorce and married again. The second marriage being then a Scotch contract, the whole question is to be determined by the law of Scotland.

The *King's Advocate* and *Phillimore* contra.

The argument has proceeded on the assumption that this is a question of Scotch contract: but the argument is ill-timed, for the Court has no knowledge of the effect of a Scotch divorce—a matter of foreign law and

(a) It appeared in evidence that they had some days previously signed the civil contract before the magistrate, and been married according to a Scotch form.

(b) The exhibit was as follows:—"Samuel Beazley, Esq., and Miss Emily Frances Conway were married by certificate of banns from St. Andrew's parish, this 26th day of July 1824, by the Rev. Mr. Morehead."

(c) It was in evidence, that after the divorce she had married a gentleman of that name.

(d) 1 Russ. and Ry. Cr. Cases 236. See also notices of the same case in *Tvey v. Lindsay*, 1 Dow. 124, et. seq.; and a note of the proceedings for divorce in the Scotch courts, in *Ferguson's* Rep. Appendix 269.

(e) Moor, 683. 3 Salk. 138. 2 Burn. Ecc. Law, 503.

not before it. The indissolubility of the English marriage contracted between parties domiciled in England has not been sufficiently considered; and the whole point turns upon that. In *Dalrymple v. Dalrymple* there was no previous contract to be dissolved: it was singly and absolutely a question of Scotch contract.

By the *jus gentium* the law of the country where the contract is entered into is to regulate: though the Scotch lawyers hold, that in a contract of marriage the law of Scotland has nothing to do with the *lex loci contractus*: "the mere fact of the marriage having been celebrated in England—whether between English or Scotch parties—is not *per se* a defence against an action of divorce for adultery committed in Scotland." Fergusson's Reports, p. 116. n. *Tovey v. Lindsay*, 1 Dow. 117, was sent back to Scotland with an intimation that the decision should be revised: but nothing further was done as the lady died. The observations of Lord Eldon and Lord Redesdale in that case pretty strongly express their opinions that a Scottish divorce will not dissolve an English marriage. There have been three subsequent decisions in the Scotch Courts on English marriages, *Duntze v. Levett*, Dec. 21, 1816. *Edmonstone v. Lockhart*, March 1816, and *Kibblewhite v. Rowland*, February 1817. In these cases as well as in *Butler v. Forbes*, March 1817, where the marriage was celebrated in Scotland between parties domiciled in Ireland; and in *Utterton v. Teuch*, Oct. 1811, where the marriage was in England, (all reported in Fergusson,) the Commissary Court rejected the conclusion for divorce à vinculo matrimonii: the Superior Court however, reversed these decisions in all these cases; and no appeal has been taken to the House of Peers. But the decisions of the Superior Scotch Court are directly at variance with *Lolley's* case; with *McCarthy v. De Caiz*, (a); and the intimation of the House of Lords in *Tovey v. Lindsay*.  
Per Curiam.

DR. LUSHINGTON.

The question raised upon the admissibility of this libel is one of extreme importance, and which might have been expected to have arisen at a much earlier period.

On the 20th May 1810, Mr. Beazley, one of the parties in this cause, married a Miss Richardson at Kensington, Middlesex: on the 29th of August 1823, they were divorced by sentence of the Commissary Court at Edinburgh, and in 1824 Mr. Beazley contracted a second marriage at Edinburgh with Emily Conway the other party in this cause. The first wife did not die till 1830, and the second wife now prays to have her marriage annulled on the ground that when that marriage was solemnized, Mr. Beazley had a wife alive.

It has been said, that the Court is bound to admit this libel, though questions of great moment may hereafter arise, and that the divorce at Edinburgh was only pleaded because it was deemed improper to keep the Court in ignorance of that circumstance. If a fact of such magnitude had been suppressed, I am of opinion that any sentence pronounced

(a) The following note of *McCarthy v. De Caiz*, Chancery, 1831, May 10th, was read in the course of the argument.

Mr. Tuke having married in England was divorced in Denmark: the wife came to England and died: the husband took out letters of administration in England to his wife, and upon his death there was a suit in Chancery between his executors and the next of kin of his wife relative to her property.

Brougham, Lord Chancellor, decreed in favour of the executors, observing that the English marriage could not be annulled by the Danish law.

by the Court would have very little availed the parties,—that it would not have been finally binding, but would have been open to re-examination,—that such suppression would, in short, have rendered all the proceedings liable to impeachment. An endeavour to obtain a sentence when any such material information was withheld, would be unfair towards the Court, and prejudicial to the due administration of justice.

Even with my present imperfect information, I must consider both what is the law of England and what the law of Scotland. Cases have been cited in which it is alleged that a final decision has been pronounced by very high authority upon the operation of a Scotch divorce on an English marriage,—that it has been determined that a marriage celebrated in England cannot be dissolved by the sentence of a Scotch tribunal,—that the contract remains for ever indissoluble. The authorities principally relied upon for establishing that position are the decisions of the twelve judges in *Lolley's* case, and the decision of the present Lord Chancellor on a very recent occasion. If those authorities sustained to its full extent the doctrine contended for, the Court would feel implicitly bound to adopt it; but I must consider whether in *Lolley's* case it was the intention of those very learned persons to decide a principle of universal operation absolutely and without reference to circumstances, or whether they must not almost of necessity be presumed to have confined themselves to the particular circumstances that were then under their consideration. *Lolley's* case is very briefly reported: none of the authorities cited on the one side or on the other are referred to, nor are the opinions of the learned judges given at any length; all that we have is the decision. It is much to be regretted that some more extended report of the very learned arguments which I well remember were urged upon that occasion, and the multitude of authorities quoted, have not been communicated to the profession and to the public.

In that case the indictment stated that on the 18th of July, Lolley was married at Liverpool to Ann Levaia, and afterwards to Helen Hunter, his former wife being then living. It was proved, that both marriages were duly solemnized at Liverpool, that the first wife was alive a week before the Assizes, and that the second wife agreed to marry the prisoner if he could obtain a divorce. The jury did not find that any fraud had been committed; but there does not appear to have been any discussion upon the very important question of domicil. A case in which all the parties are domiciled in England and resort is had to Scotland (with which neither of them have any connexion) for no other purpose than to obtain a divorce à vinculo, may possibly be decided on principles which would not altogether apply to a case differently circumstanced; as where, prior to the cause arising on account of which a divorce was sought, the parties had been bona fide domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the Court cannot, from the case referred to, assume it to have been established as an universal rule, that a marriage had in England, and originally valid by the law of England, cannot under any possible circumstances be dissolved by the decree of a foreign Court.

Before I could give my assent to such a doctrine (not meaning to deny that it may be true) I must have a decision after argument upon such a case as I will now suppose, viz. a marriage in England—the parties resorting to a foreign country, becoming actually, bona fide, domiciled in that country, and then separated by a sentence of divorce pronounced

by the competent tribunal of that country. If a case of that description had occurred and had received the decision of the twelve judges, or the other high authority to which allusion has been made, then indeed it might have set this important matter at rest: but I am not aware that that point has ever been distinctly raised, and I think I may say with certainty that it never has received any express decision.

The Court enters upon a consideration of the law of Scotland with great reluctance and much diffidence, from a fear of being led into error upon a question of foreign law. At the same time, this matter has been so frequently discussed, and there are so many reported cases upon the subject, that it cannot be treated as a matter completely hidden in the abstruse recesses of a law entirely foreign to us. I believe the course of decision in Scotland up to the present hour, has been to consider that the Scotch Courts have a right to entertain jurisdiction with respect to marriages had in England, after the parties had been resident for a certain period in Scotland, though that period had been infinitely too short to constitute what we should call a legal domicile: and that those Courts have proceeded in such cases to divorce à vinculo. At one time the Commissary Court in Scotland was much inclined in such cases to modify that remedy by substituting for the divorce à vinculo, separation à mensa et toro: but the Court of Session—the Court of Appeal—overruled the decisions of the Commissary Court refusing the divorce à vinculo, and directed that Court to proceed in the accustomed and ordinary way. None of those cases, I believe, have received the sanction of the House of Lords.

It is obvious that many most important differences may arise in cases of this description. Two Scotch persons married in England may afterwards go to reside in Scotland. Again, one of the contracting parties may be English the other Scotch. If the law of Scotland continue such as their Courts have hitherto held it to be, and if the decision in *Lolley's* case be of universal application, the issue of the second marriage may be legitimate in Scotland and illegitimate in England. The son may take the real estate in Scotland and not the real estate in England; he might possibly even be a Scotch peer and lose his English title and with it the English estates, the only support of his Scotch Peerage. It is impossible, therefore, to exaggerate the importance of this case; nor can the Court be too guarded against laying down any principle which might affect any other case than the present.

It has been argued that I must decide by the *lex loci contractus*, that this being a Scotch marriage must be determined by the law of Scotland alone, and by reference to what would be the decision of Scotch courts. I can entertain very little doubt but that the second marriage would be held valid in Scotland, unless some judgment of the House of Lords, in opposition to the repeated decisions of the Court of Session, should ascertain that the law of Scotland is not what these decisions have pronounced it to be.

But there is a preliminary consideration—the capability of the parties to contract marriage—and the true question is, whether that capability is to be determined by the law of Scotland or the law of England: the former would say that the parties are capable; the latter, supposing *Lolley's* case to govern the present, would say they are incapable.

I regret that the libel contains no averment of the domicile of the parties in England at the period of the first marriage: and that it merely



pleads that a pretended divorce took place, without stating when or for what purpose the parties went into Scotland, how long they had resided or at what period this suit was commenced. These omissions undoubtedly involve the Court in considerable difficulty. If this case, in these respects, prove similar to *Lolley's* case, I unquestionably should consider that authority to be binding upon me; but if it should be distinguished by other circumstances, such as by the permanent domicile of the parties in Scotland prior to the time when the divorce took place, I must reserve my opinion upon the question until I have heard it argued, and until all the facts and circumstances are fully before me.

I shall therefore admit this libel: but it certainly would be a great satisfaction to me, if it could be refuted by pleading the domicile of the parties at the times of the marriages and of the divorce, and the circumstances relative to the divorce: because (though it may rest upon the party maintaining the validity of the marriage to plead the facts upon which he relies for that purpose) in cases of nullity of marriage all the circumstances should appear distinctly upon the face of the libel, in order that no doubt could be entertained of the principles upon which the sentence of the Court is founded.

*The King's Advocate.*—Undoubtedly further information would have been supplied if it had been supposed that the case would rest upon the libel only: we conceived that the other party would plead before the Court was called upon for its decision. However, as far as I am instructed, the second wife is not in possession of the facts and circumstances connected with the residence of the parties at the periods in question. Such information as we can obtain shall be laid before the Court in an additional article; but we shall not be in a condition to plead those further facts till we receive information from Scotland.

*Per Curiam.*

The Court might be placed in an extremely inconvenient position if the other party should not plead, and it had to pronounce its decision upon a doubtful state of circumstances.

Libel admitted.

An additional article (admitted without opposition) pleaded;—"That Beazley's first wife was the daughter of Richardson, of the parish of St. James, Westminster, where she had resided from her childhood, and that at the time of her marriage with Beazley, and during their subsequent cohabitation, they were respectively domiciled in England. That from their separation Beazley continued to reside in England till the beginning of 1823, when he went to Scotland on business as an architect, meaning to return to England as soon as it was concluded; that in April 1823, when Mrs. Beazley instituted proceedings in Scotland against her husband, she was not residing nor had ever resided in Scotland, but was living in London." (a)

The libel and additional article were fully proved by seven witnesses. Mr. Beazley's sister, who was in Edinburgh and was present at the second marriage, gave evidence of that fact.

(a) Mrs. Beazley's sister deposed: "on the occasion of the proceedings instituted by my sister to obtain a divorce, she went to Scotland and remained there from two to three months: she never resided in Scotland but upon that occasion. I cannot say whether my sister went to Scotland for the purpose of instituting the proceedings, or whether her attendance there was required in the course of them; but I know that she never resided in Scotland before those proceedings, and that her home, though she went to Scotland for the occasion, was my father's house in London or Epsom, and at no time in Scotland."

*The King's Advocate and Phillimore.*

*Lolley's* case has determined this case: the legal domicile of both parties was England. The second marriage being had in Scotland is the only distinction between this case and that of *Lolley*.

*Addams contra.* A marriage is good or bad according to the *lex loci contractus*, unless that law is *contra bonos mores*. The English marriage was good when the English law, the Scotch marriage when, by the removal into Scotland, the Scotch law, governed the contracting parties.

JUDGMENT.

DR. LUSHINGTON.

I feel very deeply the responsibility of deciding this case; it behoves me to proceed with the most cautious and wary steps; there is no doubt of the proof and of the validity of the first marriage in 1810—of the separation of the parties in 1813, and of the divorce in Scotland in 1823, at the instance of *Mrs. Beazley*; and of the domicile of both parties in England. The Court did not require that it should be alleged that the effect of a Scotch divorce was to leave the parties at liberty to enter into another marriage, because it would have put them to the expense of proving that which was perfectly notorious. There is no doubt by the Scotch law, of the validity, as to form, of the second marriage; but that is not the important point. However, in supply of proof of that marriage a copy of the register of the Episcopal Chapel at Edinburgh has been exhibited. I am not aware that such registers are, according to the law of Scotland, documents of an authentic and public nature; nor that a copy of an unauthentic register is by that law admitted as evidence. But according to the law of this country, as I believe it has been practised in the Courts of Westminster Hall, I think I should act more safely by rejecting it. I consider it to be of the highest importance that this Court should adhere to the same rules of evidence as prevail elsewhere; indeed I should entertain some doubts whether Ecclesiastical sentences could be received in the Courts of Westminster Hall as conclusive, if it were known that they were founded on evidence altogether inadmissible by the rules of those tribunals; but however this might be, it is certainly wiser to adhere to the same principles wherever practicable. It would therefore only be after great consideration and hesitation, or after being bound by an express decision of the superior Court, that I could consent to admit such an exhibit; and I reject it, the more readily, as the establishment of such a precedent in this case would be perfectly gratuitous, since the marriage is proved by a witness who was present at the ceremony: and since, in point of fact, a Scotch marriage by banns is not more valid than a less formal marriage.

One only distinction exists between this case and that of *Lolley*, viz., that here the second marriage took place in Scotland: in neither case is there any proof of collusion in resorting to Scotland; and in neither case is there any domicile in Scotland; and, as in my judgment the question of domicile might form a most important and distinguishing feature, the due effect of a Scotch domicile on the decision of these cases would demand a very careful consideration. That, however, does not arise in the present case.

It has been urged, that this second marriage was to be decided solely with reference to the *lex loci contractus*; undoubtedly, questions of marriage are *prima facie* to be judged of by the law of the country where

they are solemnized; but I am of opinion that, before considering the second marriage, I must ascertain the capability of the parties to contract. If both the parties, being at the respective times of the first marriage and of the divorce domiciled English subjects, were by the law of England prohibited by a personal incapacity from entering into such a contract, I must apply the rule of that law. Thus in *Doe v. Vardill*, 2 L. 5 B. & C. 438, it was decided, on the statute of Merton, that a person born ante justas nuptias of parents domiciled in Scotland and subsequently intermarrying there, was under a personal disability to inherit landed property in England, though the Judges carefully abstained from giving any opinion against his legitimacy: but had his parents been domiciled in England at the time of his birth and subsequently intermarried, he would have been prevented by a personal disability from becoming legitimate by that subsequent marriage, and from deriving in Scotland the benefits to which, but for that personal disability, he would upon such marriage be entitled by the law of Scotland (a).

It is useless, however, to reason from principles or analogy. I am bound by authority: for since it now appears that neither of the parties to the first marriage were at any time bona fide domiciled in Scotland, no sound distinction exists between the present case and that of *Lolley*. I therefore pronounce the second marriage null and void. My judgment, however, must not be construed to go one step beyond the present case: nor in any manner to touch the case of a divorce a vinculo pronounced in Scotland between parties, who though married when domiciled in England, were at the time of such divorce bona fide domiciled in Scotland; still less between parties who were only on a casual visit in England at the time of their marriage, but were both then and at the time of the divorce bona fide domiciled in Scotland.

Sentence of Nullity signed.

(a) See *Shedden v. Patrick*, and the *Case of the Strathmore peerage* cited, arguendo, by Tindal, 5 B. & C. 444, and *Rose v. Drummond*, House of Lords, 1831.

## IN THE ARCHES COURT OF CANTERBURY.

MYTTON v. MYTTON.—p. 657. 10 Paige, 37.

After sentence of separation by reason of gross cruelty and adultery on the part of the husband, the real estate being 6000*l.* a year, subject, as alleged by the husband, to large incumbrances, the mother's jointure having been 1000*l.*, and the wife's pinmoney 500*l.* a year, the Court allotted 1000*l.* a year permanent alimony, allowing the husband to deduct from that sum any payment on account of pinmoney, above 200*l.* a year,—the sum agreed to be paid to the wife for the maintenance of the children.

THIS was a suit of separation, by reason of the husband's cruelty and adultery. A libel of forty-four articles, with eight letters from the husband, had been admitted without opposition: it pleaded the marriage on the 29th of October, 1821, the birth of five children, and cohabitation until the 16th of October, 1830. The witnesses upon this libel having been examined, an allegation for the husband was admitted after debate.

The answers of the wife, which negatived all the material averments, were taken upon this allegation, but no witnesses were examined upon it, nor did any counsel appear for the husband at the hearing of the cause; and on this day the Court signed the sentence of separation.

The alimony pending suit had been fixed at 300*l.* per annum, in addition to 500*l.* per annum settled as pin money, and to 200*l.* promised by the husband as an allowance to his wife for the maintenance of the children, and to be computed from the return of the citation. The present question related to permanent alimony.

*Lushington*, and *Dodson*, for Mrs. Mytton.

Mr. Mytton has voluntarily offered to allow to Mrs. Mytton 200*l.* a year for the maintenance of the children, now, and to increase it as they grow older; but he has not paid it, nor have we any means of recovering it. Under the direction of the Court of Chancery, the children are to remain with their mother, and to be placed under guardians. His property is large, and the deductions he claims are for the most part the effect of his own follies.

JUDGMENT.

SIR JOHN NICHOLL.

In this suit the sentence already pronounced has decreed separation a mensa et toro, at the wife's prayer, on account of the husband's cruelty and adultery; and certainly it is one of the grossest cases of misconduct in both particulars that ever came under the notice of the Court. The allegation of the husband is too offensive and disgusting to detail, but on it no witnesses have been produced: the wife has in her answers negatived all the imputations attempted to be cast upon her. She therefore stands perfectly untainted by his averments.

The present question is, what is the proper allowance to be made to the wife, while living separate and apart from her husband. The husband by his own account has very large estates, but the answers claim very large deductions. The gross amount of the real estates is stated to be 6000*l.* per annum, but he claims to subtract 4350*l.* for incumbrances, and the interest of debts which he has incurred. It is impossible for the wife to go into evidence, to ascertain the amount of the net income; nor would the Court be disposed to allow the full deductions claimed on account of outgoings, occasioned by his own extravagance and profligacy. It would look rather to other facts, in order to judge what should be the wife's allowance. The jointure of the mother is 1000*l.* per annum,—that was not considered too large an allowance for his father's widow, and this unfortunate lady is in a worse situation. Again, her pin-money was fixed at 500*l.* per annum. A husband, who has such a fortune as to give that sum as pin-money, should make an ample allowance for his wife while living separately on account of his misconduct. The husband, it is stated, has voluntarily undertaken to pay to his wife 200*l.* a year for the maintenance of the children. That arrangement, however, it is not within the authority of this Court to enforce; but I shall allot 1000*l.* a year permanent alimony, allowing the husband to deduct from that sum any payments exceeding 200*l.* a year, which he may actually make on account of pin-money. The wife will thus have the aid of the power of this Court for the payment of the whole 1000*l.*; and in addition will have a collateral remedy to secure from her pin-money the payment of 200*l.* a year for the children.

**The Office of the Judge Promoted by WHISH and WOOLLATT v. HESSE, Clerk.—p. 659.**

Simony, on the part of a presentee to a living, being in law a very odious offence, and the consequences of conviction thereof highly penal, the law, even if a simoniacal agreement is established, requires the strictest proof of the presentee's privity thereto before induction, or of his confirmation thereof after; so, in proof that a clerk is simoniacæ promotus, a corrupt agreement must be no less conclusively shown. In a criminal suit against a clerk for simony, and for being simoniacally promoted, the Court holding, 1st, that neither his privity to, nor confirmation of, any simoniacal contract was proved,—2dly, that no criminal contract was established,—dismissed him from the suit, and condemned the promoters in costs.

Semble, that when a clerk is simoniacæ promotus without his privity or subsequent confirmation, the Ecclesiastical Court cannot proceed to a sentence of deprivation in a criminal suit.

A party cannot except to a witness by contradicting answers to interrogatories which go to incidental, collateral matter, and are not relevant to the issue.

Quære, whether acts subsequent to induction in confirmation of a simoniacal agreement made without his knowledge, amount to simony on the part of the presentee?

The improbability of his evidence is not sufficient to discredit a witness of good general character speaking firmly and solemnly, unless such improbability amount almost to absolute incredibility, and be incapable of explanation.

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**IN THE COURT OF PECULIARS.**

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**BLAKE v. USBORNE.—p. 726.**

A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew had for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew. On the plaintiff declaring he proceeded no further, the Court dismissed the defendant with a sum nomine expensarum, refusing to give full costs on the ground that there had been irregularities on both sides.

By the general law, the use of all pews belongs to the parishioners, who are to be in the first instance seated by the churchwardens, subject to the control of the Ordinary.

On the expiration of a faculty limited to a certain period, the right of the parishioners to the pews, the subject of such faculty revives.

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**IN THE ARCHES COURT OF CANTERBURY.**

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**STORY v. STORY.—p. 738.**

In matrimonial suits, the libel must contain all facts that can by diligence be ascertained at the time, and subsequently, new facts only—which are nearly conclusive of guilt—can be pleaded. The Court, on appeal, affirmed the rejection of additional articles, on the ground that the facts might have been pleaded originally, and were inconclusive.

THIS suit commenced in the Consistory Court of London by a citation taken out by the husband on the ground of his wife's adultery.

The parties were married, by banns, in March 1807, and cohabited

until June 1831. They had six children living. In support of the charge of adultery the following were circumstances pleaded in the libel as reformed after debate.

That in June 1830, J. A. Harper (a nephew of Mr. Story's) returned from India and resided with his father at Hackney, but often visited his uncle, and frequently walked alone with Mrs. Story, when improper familiarities passed, and a criminal intercourse was formed and carried on between them. That Mrs. Story, on the 21st of May, 1831, in her way to Brighton, went to Mr. Harper's the father of Mr. Story's nephew. That about two in the morning of the 22nd Miss Story, a sister of Mr. Story, was awakened by a noise from Mrs. Story's room; that on listening she distinctly heard the voices of Mrs. Story and J. A. Harper as if conversing in an endearing tone: that Miss Story, having knocked at the door of Mrs. Story's room and ascertained from her that she was not ill, went immediately to the bed-room of J. A. H. and not finding him there, knocked again at Mrs. Story's door and was admitted, the door being unlocked and opened by Mrs. Story in her night dress only, who, in answer to Miss Story, informed her that she did not know where was J. A. Harper; that Miss Story observing the bed to be in great disorder, lifted up the vallance, and discovered J. A. Harper, in his night cap and shirt only, under the bed; that she thereupon retired to her room, but shortly afterwards, at Mrs. Story's request, returned, when Mrs. Story earnestly entreated her not to divulge what had occurred, and observed, "it was more my fault than his." That while Miss Story was at Mrs. Story's door, Charlotte Tallowin, a servant in the family, having been disturbed by the knocking, came down stairs, saw Miss Story at the door and heard her speaking. That on the said occasion adultery was committed.

The libel further pleaded, that Miss Story, about two days afterwards, thinking it was her duty not to conceal the transaction of 22nd of May from Mr. Harper, the father, informed him, but by his desire did not disclose it to Mr. Story. That Mrs. Story having paid a visit in Richmond Terrace stayed for a few days with her husband at an hotel in Surrey Street, after which she on Monday 13th of June, proceeded to Brighton with her daughters and servant, and there joined her mother. That almost immediately after Mrs. Story had left the hotel a letter (by the two-penny post) addressed to her was delivered to her husband: that he read it, and being much surprised and alarmed at the contents (a), advised thereon with his sister Mrs. W. Harper, (who aware of the circumstances already pleaded) strongly recommended him not to permit his nephew to visit his family at Brighton, and ultimately informed him, hitherto ignorant and unsuspecting, of his wife's adulterous intercourse: that the intelligence much shocked and distressed him, and he consulted with his half-brother, and requested him to acquaint Mrs. Story with his (Mr. S.'s) determination not to live with her again: but it being arranged that this communication should be

(a) The letter was as follows.

"DEAREST MARY,

"I am most cruelly disappointed not having the pleasure of seeing you, shall wait at home all tomorrow in anxious expectation of a note. Do let me see you.

"Sunday.

"Did you get mine safe?"

"Yours ever most sincerely."

deferred, it was not made till the arrival of Mrs. Story in London, on her way home.

Annexed to the libel was a pocket book pleaded to be Mrs. Story's, and it was alleged that opposite to the date of 28th April, 1831, "My dearest life, I love you, H." was written by J. A. Harper with her concurrence (a).

On the by-day an additional article to the libel was debated:—it pleaded, that from the 15th to the 25th February 1831, Mrs. Story and daughters were on a visit at Mr. Harper's and Mrs. Story and J. A. H. occupied rooms opposite to each other: that, one morning, while making Mrs. Story's bed, Harbour, one of the housemaids, observed on the sheets certain marks or stains precisely similar to those which had been frequently noticed by her and others in the bed of J. A. H., and which were well known by them to be occasioned by the discharge of the colour from the silk drawers in which he had, since his return from India, usually slept. That Harbour suspecting that J. A. H. had been in Mrs. Story's bed, showed to Charlotte Tallowin the stains; that the same were not on the sheets when the bed was made on the previous day, and the sheets had not been changed. That on Mrs. Story's night dress, put on clean the preceding night, were corresponding marks. The article pleaded on this occasion, adultery.

The rejection of this additional article having been appealed from, the admissibility of it was again debated.

*Addams and Matcham* against the admission.

*Dodson and Haggard* contra.

JUDGMENT.

SIR JOHN NICHOLL.

This is an appeal from the Consistory Court of London on a grievance,—the rejection of additional articles to a libel.—It is a suit brought by the husband for separation by reason of adultery; the citation was returned on the 4th of August 1831, the libel was brought in on the 20th of October 1831, was admitted on the second session of Michaelmas Term, the 18th of November; on the by-day, the 10th of December, the additional articles were brought in; on the 14th of December were rejected; and from that rejection the husband has appealed. I must suppose there will be some evidence of familiarities at St. Alban's, and if the libel be proved as laid, there will be full proof of adultery.

I am of opinion that these additional articles were properly rejected. First, a party is not at liberty to make charges by piecemeal; he must bring forward all his case at once, particularly as, though the suit is not <sup>44</sup> a criminal suit, the charges are of a criminal tendency and nature: it is <sup>33</sup> *causa criminalis civiliter intentata*. It is the duty of a party before he decides on such a suit to make every possible inquiry and then to propound all his facts at once. Here the party had ample opportunities for making inquiries; he had pleaded indecent familiarities, and a fact of adultery on the morning of the 22d of May, and had vouched the servant, Tallowin, as a corroborating witness; she therefore must have been questioned as to her observations of the conduct of the parties not only then but previous to that period, and she is now one of the witnesses vouched to these additional articles. The party had no right to lie by a month and then bring forward fresh facts; there is no appearance that

(a) The rest of the libel was totally irrelevant to the question before the Court.

these facts were discovered subsequently to the admission of the libel, or at least that they might not with diligence have been sooner discovered.

Again, there are, as I have said, sufficient facts pleaded in the libel to entitle the party to a sentence, but at all events the Court would not admit new facts unless they were not merely important, but nearly decisive and conclusive. What then are the facts? That there were in both beds stains of a similar colour; the colour is not stated, but it is conjectured that these stains were produced by the silk drawers of the alleged paramour; and from thence they infer adultery. The fact is much too equivocal to warrant any inference, still less to amount to proof, of adultery: these marks are only pleaded to have been observed on this single occasion; nor are there any specific familiarities alleged, nor is there any averment that there was the impression of two bodies in the bed, or any other indicia of the parties having lain together. This was three months before the only fact of adultery charged, and arguments favourable to the wife might be drawn from this, for if such suspicions were excited among the servants, the absence of all subsequent conduct exciting suspicion tends to exonerate her.

But this matter comes too late: the libel must contain all the facts that could by diligence be ascertained at the time. If the husband is able to prove his libel, that will be sufficient; if not, it is unjust to put the wife to answer such vague conjectures in an amended libel.

I pronounce against the appeal and remit the cause.

#### COTTERELL v. MACE and JAMES.—p. 743.

On the refusal of a monition against district churchwardens to join the parish churchwardens in making a rate, the district churchwardens, though no parties to the suit below nor to the decree complained of, may, notwithstanding the formal words of the inhibition, be made the only respondents in an appeal, and the refusal of such monition, being a case within the third exception of the statute of citations, authorises the citing the parties out of their diocese. Respondents appearing under protest assigned to appear absolutely. Costs reserved.

### IN THE PREROGATIVE COURT OF CANTERBURY.

#### In the Goods of HENRY SELWYN.—p. 748.

The husband and wife having been drowned together, the Court (the wife's next of kin not opposing) granted probate, in common form, of the husband's will to executors substituted "in the event of her dying in his lifetime," the will appointing her executrix "if living at his decease."

MR. Selwyn and his wife, while on a voyage from Liverpool to Bangor, perished at sea on the 18th of August. They left no issue. By his will he directed that his wife, *if living at his decease*, should have all his property and be sole executrix; and, *in the event of her dying in his lifetime*, then the will appointed three executors and trustees. No proof could be obtained as to the exact time at which either of the parties died:



their bodies were found floating near the shore some few days after the wreck.

*Addams*, for the substituted executors, prayed probate.

*Per Curiam*.

This case arises out of the unfortunate accident of the *Rothsay Castle*. Instances have occurred where, under similar circumstances, the question has been, which of two persons survived; but in the absence of clear evidence, it has generally been taken that both died at the same moment. In the case of *Taylor v. Diplock (a)*, which was elaborately argued, both on authorities and presumptions, the Court held, that the parties must be taken to have died at the same instant; that nothing vested in the wife; and granted administration to the next of kin of the husband. Here the wife and her representatives would have no interest in the effects, under the words "in case she should be living at his death." The only difficulty arises from the other clause providing that the substitution of the executors and the devise over shall take effect in the event of her "dying in his life-time." Without going into the general presumption that the husband was the stronger and therefore survived, the intention is so clear, that whatever might be the strict construction of the words in other Courts, I shall decree probate in the common form; the next of kin making no opposition to the grant, and having it in their power, if they should hereafter see fit, to call in the probate and contest the point.

Motion granted.

(a) 2 Phill. 271. See also *Colvin v. the King's Proctor*, 1 Hagg. 92.

### BIRKETT v. VANDERCOM.—p. 750.

A married woman—executrix—and having private property, over which she had and exercised an appointing and disposing power, can continue the chain of executorship.

DANIEL Birkett, senior, left by will certain property to Sarah, wife of Daniel Birkett, junior, his nephew, for her separate use; and gave the residue of his effects to his said nephew, and appointed him sole executor. The nephew proved in 1817, and died, having made his will, appointing Quilter and Vandercom residuary legatees in trust for his wife for life, then for his children as she should by will appoint. He named his wife and Quilter executors, and they proved the will.

Mrs. Birkett subsequently married Logan, reserving to herself by two several indentures the power of making a will. She survived Quilter, and in Logan's lifetime made a will, and died in March, 1831. By her will she gave the property, to which she was entitled, or which she had the power of appointing, (under the above two wills,) among her children equally; and appointed her sons, Charles and John, executors. Charles renounced. John prayed probate, limited, 1st, to the powers under the two indentures; 2dly, to the effects of Daniel Birkett, senior, and Daniel Birkett, junior, left unadministered, over which she had and exercised a power of disposing and appointing by will; and 3dly, to the power of appointing an executor to Daniel Birkett, the younger. A decree having issued citing Vandercom to show cause why probate, so limited, of Mrs. Logan's will should not be granted to her son John, as executor,

an appearance was given for Vandercom, who prayed administration to Daniel Birkett, junior, as his surviving residuary legatee in trust.

Proceedings were pending in Chancery in respect to the property of Daniel Birkett, senior.

*Addams*, for Vandercom.

The prevalent notion, that the chain of executorship is broken, is certainly at variance with the cases of *Scammell v. Wilkinson*, 2 East, 544, *Stevens v. Bagwell*, 15 Ves. 156, and *Hodsdon v. Lloyd*, 4 Bro. C. C. 533, which will be relied upon on the other side. In Mr. Stevens's will, however, there was no residuary legatee in trust; while here, Vandercom's power, as such, extends to the children, after the death of their mother, whose executor now claims the representation.

The *King's Advocate* and *Haggard*, contra, were stopped by the Court.

*Per Curiam*.

I cannot see on what principle the chain of executorship is not continued: besides, John Birkett has a direct interest; he is the most proper person to be the representative, in order to bring all adverse matters to a final decision, while Vandercom is a mere trustee, and has no beneficial interest, but is the solicitor for others claiming a beneficial interest.

*Addams* prayed Vandercom's costs out of the estate.

The *King's Advocate*. Vandercom should be satisfied that he is not condemned in costs.

*Per Curiam*. I shall decree the probate as prayed.

## PHILLIPS v. THORNTON.—p. 752.

An allegation pleading that a will made at Batavia containing a revocatory clause, dispositive, and duly executed, was not intended to revoke or to dispose, rejected.

ROBERT THORNTON, formerly of Southwark, died at sea in October 1824. In 1812 he executed a will in respect to his landed property, which he gave to his brother, and appointed him sole executor: and in June 1819 he appended a codicil to the will bequeathing to his brother all his property of every description. The testator in August 1819 sailed from this country with his sister, to carry on his mercantile pursuits at Batavia; and while resident there, he on the 12th of August 1820, executed a will, drawn up in the Dutch language, and attested by a notary public and two witnesses. The will contained a general revocatory clause, and through default of lineal descendants, appointed his sister, of mature age, his executrix and universal heiress of all his goods, property and chattels, moveable and vested, stock and credits without any exception. It excluded from his estate and property the members of the Orphan's College. A copy of this will, (the original having been proved at Batavia,) was propounded by Mr. Phillips, who, after the testator's death, intermarried with the sister and had survived her. The allegation was admitted, unopposed; and the answers of the brother admitted the deceased's affection for his sister, and that he was of perfectly sound mind when he executed the will propounded.

A requisition having issued to Java to take evidence on the above plea, an allegation on the part of the brother was brought in: it pleaded, that at Java, the Orphan's College in cases of intestacy, immediately

takes upon itself the custody and control of the deceased's effects, and invariably appropriates to itself at least one-tenth of the property; that another tenth at least, and frequently more, is absorbed by the costs and charges occurring during such custody, and the fees and dues payable on the recovery of the remainder by those entitled to the succession, and that such possession occasions a great delay; and that to defeat such claims it is almost the invariable practice for strangers at Batavia to make a testamentary disposition, and thereby exclude any interference on the part of the chamber; that such instruments are local from their very nature, and not intended to affect property not situated within the island; that the testator's sole object was to bar the college; and that he was not aware that he was revoking any subsisting will which disposed of his property elsewhere.

The *King's Advocate*. The allegation must be rejected: the Court cannot look at such averments in direct contradiction to a regularly executed and subsisting will.

*Phillimore, contra.*

This must be considered as a question of foreign law, as the will was executed in Batavia. The Court must in order to decide the question, have the law of Batavia before it.

JUDGMENT.

SIR JOHN NICHOLL.

This allegation is rather of an extraordinary kind, not denying affection for the sister, not denying the execution of the paper, not attempting to show any improbability that the deceased should leave his property to this sister who had accompanied him to the other side of the globe, but alleging that the instrument was executed quite for a different purpose,—to prevent the Orphan's College from taking possession of his property after his death in case of an intestacy. That cannot destroy the disposing effect of the paper, which is regularly attested by a notary and two other witnesses. It is quite impossible to admit evidence to the effect of this allegation against the executed instrument.

I reject the allegation.

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#### In the Goods of ELIZABETH BRAND.—p. 754.

A testatrix executed a will, and thereupon destroyed a former will, and subsequently executed two other wills. The last will was propounded, but abandoned. A decree then issued calling on all parties interested to show cause why probate of the instructions for the first will should not be granted; and the Court, on proof per testes that the instructions were of the same effect as the first will, that that will was executed when the deceased was sane, but destroyed and the other wills executed when insane, pronounced for the instructions, and refused costs out of the estate to persons in distribution who by interrogatories set up insanity when the first will was executed.

ELIZABETH BRAND died on the 9th of January, 1831, aged 80; she left a sister, only next of kin, and a nephew and several nieces entitled in distribution. On the 2d of December, 1828, she executed a will prepared by her solicitor, in conformity with her instructions which he had written down in her presence, and which were then read over to, and approved of by, her. Of this will she appointed four executors and four residuary legatees, two of whom were, her nephew, Charles Brand, and her niece, Elizabeth Brand. The deceased became of unsound mind

some time before the 10th of March, 1830, and so continued till her death. During her insanity she destroyed the will of December, 1828, and executed three other wills, the first dated the 10th of March, 1830, the second on the 19th of March, and the third on the 28th of October, with various executors and residuary legatees. The two executors (who were also two of the residuary legatees) renounced the instrument, dated the 28th of October, but probate of it was propounded by the third residuary legatee, (a) and opposed by Charles Brand, the nephew: an allegation in support of the paper was admitted, and witnesses examined on it, when the residuary legatee declared that she proceeded no further.

The *King's Advocate*, upon an affidavit of the solicitor as to the will of the 2d December, 1828, being of the same purport and effect as the instructions, and also as to the destruction of the original will, and the deceased's incapacity, moved for a decree with intimation to issue against the several parties in distribution, and against parties interested in the pretended wills of the 10th and 19th of March, 1830; the latter to appear, propound, and prove the wills, if they saw fit; and all to show cause why probate of the instructions of the will of the 2d of December, 1828, as containing the last will of the deceased, should not be granted to Charles and Elizabeth Brand, as two of the executors.

Motion granted.

The decree having issued, an appearance was given for several of the parties in distribution; an allegation, propounding the instructions, pleaded the factum of the original paper, the subsequent insanity of the deceased, continued affection to the parties benefitted till the time she became insane, and the destruction of the paper on executing the paper of the 10th of March, 1830, and during her insanity. This allegation was admitted without opposition. Witnesses were examined, to whom interrogatories were administered with a view of establishing that the insanity existed previous to the execution of the will of December, 1828. On the second session of Trinity Term, the cause came on for hearing.

*Burnaby and Nicholl*, for parties in distribution, admitted the sanity of the deceased when the will of December, 1828, was executed; and the destruction of that will while in a state of insanity: and prayed costs out of the estate on the ground that under the decree the parties were fully justified in administering interrogatories, that though insanity had not been carried back to December, 1828, yet that there were traces that the deceased's mind had been affected sometime previous to the period fixed on by the executors; and that the instructions must have been proved per testes against the parties interested in the wills of March, 1830.

The *King's Advocate* and *Lushington* contra.

*Per Curiam*.

The parties were justified in, but were not under the necessity of, coming before the Court. I can see no grounds for decreeing costs out of the estate.

(a) In the paper of the 10th and 19th of March she was also joint residuary legatee.

## SMITH v. SMITH and Others.—p. 757.

*On Protest.*

Royal peculiars being altogether independent of the Archbishop, the will of a deceased who left goods in two royal peculiars, in one of which he died, and other goods in one diocese only within the province, is rightly proved in the royal peculiar where he died. The executor, who so proved the will and appeared under protest to a citation calling upon him to take a Prerogative probate, dismissed.

Quære, whether the probate of one royal peculiar will authorise the administration of goods in another?

If a deceased died in a royal peculiar, and left bona notabilia in two dioceses within the province, the Prerogative Court must grant probate on an office copy or exemplification of the royal peculiar probate.

JOHN SMITH, late of Ludstone Hall, in the parish of Claverly, Shropshire, died on the 18th of February, 1830, and, on the 15th of May, his will was proved by his executors (under 4000*l.*) in the Royal Peculiar of Bridgnorth. John Smith, a son, and one of the residuary legatees, having since cited the executors to bring in the will and take probate in this Court, they denied the jurisdiction, and alleged, that the testator died within the royal peculiar and exempt jurisdiction of the Deanery of Bridgnorth, and that he left goods within that peculiar, and also within the royal peculiar and exempt jurisdiction of the Collegiate Church or King's free royal Chapel of Wolverhampton, in the county of Stafford, but was not, at his death, possessed of any other goods within the province of Canterbury: that the granting probate of the wills of persons deceased leaving goods within the Deanery of Bridgnorth, and also within the jurisdiction of the Collegiate Church of Wolverhampton, belongs to the Courts of the same respectively. In reply, Bridgnorth and Wolverhampton were not admitted to be *royal* peculiars; and it was alleged, that the deceased's goods in each of the said jurisdictions were upwards of 5*l.*; that there was also due to his estate divers debts of upwards of 5*l.* in value within the diocese of Lichfield and Coventry, besides his goods within the respective peculiars; and that therefore the deceased had, at his death, goods, chattels and credits in divers dioceses or peculiar jurisdictions within the province of Canterbury sufficient to found the jurisdiction of this Court.

In support of the protest, an affidavit of the registrar of the royal peculiar of the deanery of Bridgnorth set forth that Bridgnorth was a *royal* peculiar, and that the jurisdiction was free and exempt from all ecclesiastical authority, that it extended over six parishes, of which Claverly was one; that the Court had, as he believed, from time immemorial exercised the power of granting probates of wills and letters of administration of persons deceased leaving, within its jurisdiction, goods of whatever value, and also if, in addition, they left other goods of whatever value, within any other jurisdiction. That causes entertained in the Court of Bridgnorth, were appealed direct to the Delegates; that, in 1829, the Prerogative Court of Canterbury received from the said royal peculiar an office copy of the will of Robert King, proved at Bridgnorth, upon which the Prerogative Court granted a second probate, the original will remaining at Bridgnorth; and that this was the practice (a).

(a) The following extract of a letter dated 28th October, 1802, to the Registrar at Lichfield was read to the Court:—

The registrar of the Court of the Collegiate Church of Wolverhampton made an affidavit that Wolverhampton was a *royal peculiar*: he was not aware of any appeals from that Court; that the probates of wills and letters of administration issued under the seal of the Wolverhampton Court are headed, "Official Principal of the Peculiar and Exempt Jurisdiction of the Collegiate Church or King's Free Royal Chapel of Wolverhampton." That in office copies of wills, the copies were always headed, "Extracted from the Registry of the Royal Peculiar of Wolverhampton." On the other side there was an affidavit, dated on the 18th of November, in which it was stated, that three persons living, at the testator's death, in the diocese of Lichfield and Coventry, were indebted to him 90*l*.

The *King's Advocate*, for the executors.

Bridgnorth and Wolverhampton are stated in the registrar's office to be royal peculiars; and the averment to the contrary is not supported.

"Sir William Wynne, Judge of the Prerogative Court, is of opinion that the Royal Peculiar of St. Mary in Shrewsbury is to be taken as a place out of the province, and he will accept an office copy of the will instead of the original, provided it commences with 'Extracted from the registry of the royal Peculiar of Saint Mary in Shrewsbury,' and is signed by the Registrar as such."

\* \* The Editor has been furnished with the following case.—Prerog. 1744. Mich. Term.

#### CROWLEY v. CROWLEY.—p. 758.

The process of the Prerogative Court does not run into a royal peculiar, but must be served by letters of request.

SARAH COLMAN died intestate, leaving an only child, wife of G. Crowley. A proctor exhibited his proxy for her, and prayed a commission to swear her administratrix: commission extracted on 6th July 1744, and not being returned, *Rous*, for the husband prayed commission of appraisement and monition against the wife to show the goods, &c. to the commissioners. Monition personally served and oath made of the service, and that she refused to appear and show the goods. On 6th September, *Rous* prayed her to be decreed excommunicate, and administration to be granted to the husband, giving security. *Holman* appeared for the wife, under protest to the jurisdiction, and prayed *Rous*'s petition to be rejected, alleging—that the deceased some time before and to her death lived at Poole, which is within the royal peculiar jurisdiction of Great Canford, and totally exempt from all ecclesiastical jurisdiction but that of the person appointed by the Crown: that all the deceased's effects were within the jurisdiction of Canford, except a leasehold estate of 9*l*. per annum at Pudlesome in the county of Dorset; that his client before and at the time of granting the commission was an inhabitant of Poole, and therefore not subject to the jurisdiction of this court; that the commission being directed to be executed within that royal peculiar without a requisition to the proper ordinary, his client was advised that by law she was not obliged to appear at the execution of the commission; that she is willing to take administration in this Court of the deceased's effects lying without the said royal peculiar, in case the judge shall direct her so to do; and to show all such effects as are not within the same to such commissioners as the Court shall hereafter name.

*Contra*.—It appeared by affidavits that there was a legacy of 50*l*. due to the deceased from a person living out of the jurisdiction of the royal peculiar in the county of Dorset, and also debt by bond from a person living at Winborn Minster, which is another royal peculiar jurisdiction in that county.

Dr. Jenner, for the husband, cited 23 H. VIII. c. 9. s. 4.

Dr. Andrew, *contra*, cited Sir *George Markham's case*, and the *Duke of Hamilton's case*.

The Judge (Dr. Bettesworth) was of opinion that he could not enforce the monition in the royal peculiar jurisdiction without directing letters of request to the proper ordinary of the place.

The above case Sir Edward Simpson says he transcribed from the notes of Doctor Jenner, who added:—

The wife afterwards took different administrations for the goods which were in the several royal peculiars, and an administration in the Prerogative for those which were in other places: the whole effects were, as far as I can recollect, within the county of Dorset."

*Per Curiam.*

There being nothing to contradict the statement in the protest, I must consider them both as royal peculiars.

*Lushington.*

I do not object to argue the case with that concession.

*King's Advocate.*

As royal peculiars, then, they are exempt from archiepiscopal jurisdiction. The affidavit and account brought in on the part of the legatee seems at variance with the executor's oath—that the testator had at his death no goods out of the jurisdiction of Bridgnorth and Wolverhampton; but, in reply to the protest, no particulars of the effects alleged to be in the diocese of Lichfield and Coventry were set forth, and the affidavit, to sustain the averment, has been brought in so very recently, that the executors have not had an opportunity of answering it. If, however, there were such effects, this Court could not direct the transmission of the will.

*Lushington, contra.*

Gibson, p. 472, in commenting upon the 93rd canon, says, "where one dies possessed of goods in several peculiars within the same diocese, in that case administration shall be granted by the metropolitan, as they are exempt from the ordinary." Here the testator left bona notabilia both in Bridgnorth and Wolverhampton, and they are both locally within the same diocese. The 92d canon, on which the Court relied in *Scarth v. The Bishop of London*, 1 Hagg. 637, directs inquiry as to whether a party, at his death, had "any goods or good debts in any other diocese or peculiar jurisdiction than that wherein he died to the value of 5*l.*," and if so, the probate or administration belongs to the archbishop.

*Per Curiam.*

Can it be maintained that under the word "peculiars" the rights of the Crown have been taken away by the canon?

*Lushington.*

If an exemption had been contemplated in favour of the royal peculiars, it is most probable that Bishop Gibson would have noticed it. Westminster is a royal peculiar; yet, in practice, when a party dies within that peculiar, the prerogative jurisdiction is not ousted. A decision supporting this protest will lead to extreme inconvenience and the expense of multiplied probates.

## JUDGMENT.

## SIR JOHN NICHOLL.

This is a question respecting the jurisdiction of the Prerogative Court, arising out of the following circumstances. John Smith died sometime since in the parish of Claverly, in the county of Salop: he made a will, appointing his two sons executors and three residuary legatees. John Smith, one of the residuary legatees, has cited the executors to bring in the will and take probate in this Court, alleging that the deceased left bona notabilia within the province of Canterbury.

An appearance has been given for the executor under protest, denying that there were bona notabilia, and alleging that the deceased died in the peculiar jurisdiction of Bridgnorth; that the will was proved there; that the deceased had considerable property within that jurisdiction, and also in the peculiar jurisdiction of Wolverhampton, but that both are royal peculiars: the protest further denied that there were any effects within the province of Canterbury.

It is admitted that there are goods in both peculiars, and it is asserted

in the affidavit that there are also other goods within the diocese of Lichfield and Coventry. Affidavits have been made by the respective registrars of each peculiar which there is nothing to contradict, and which satisfactorily prove that they are royal peculiars; that, as such, they have at all times been in the habit of granting probates and administrations, and that the appeal lies from them, not to the Archbishop's Court, but to the Court of Delegates. It is disputed whether there are any effects in the diocese of Lichfield and Coventry; but I will assume such to be the fact, for the purpose of considering this case.

Two questions arise: First, whether goods in one or both of the royal peculiars found the jurisdiction of this Court so as to make it incumbent on a party to bring in the will, and take probate here: secondly, whether the goods within the diocese of Lichfield and Coventry found the prerogative jurisdiction.

In the first place I apprehend that a royal peculiar is in no degree subject to the Archbishop; it is independent of him: it is out of his province in point of jurisdiction as much as the province of York or of Dublin: it is coordinate. An appeal from a royal peculiar does not lie to the Archbishop, but to the King in Chancery, that is, to the Delegates. The deceased, then, having died in the royal peculiar jurisdiction of Bridgnorth, being domiciled there, his property lying there, it follows that the probate there granted is regularly granted, and that jurisdiction is rightly in possession of the will. The fact that he had goods also at Wolverhampton, another royal peculiar, does not vary the case in respect to the jurisdiction of this Court, any more than if those goods were within the province of York. Whether the probate at Bridgnorth legally authorises the administration of the goods at Wolverhampton, or whether there should also be a probate there, is not a matter that affects the question in this Court. The peculiars contemplated by the canon, and by the authorities referred to, are not in my opinion royal peculiars, but subordinate peculiars.

It is true—and that is the great argument,—that the inconvenience and extra expense occasioned by royal peculiars are the same which are provided against in the case of other peculiars by the prerogative of the archbishop: but that inconvenience and expense, arising from the necessity of two probates, where there are two independent jurisdictions neither subject to the archbishop, equally exist when there are goods in Canterbury and York. All peculiars, even royal peculiars, may be of public inconvenience; but at present they exist lawfully, and possess legal rights which must be respected. The inconveniences have been pointed out, and are such as call loudly for a remedy, particularly now that personal property is so extended: but under the present law, I am of opinion, that this Court has no right to call in the will, and compel probate here, because the goods in one or more of the royal peculiars happen, geographically speaking, to be locally situate within the province.

Another point has been made, viz., that some of the goods are in neither of the royal jurisdictions, but are in the diocesan jurisdiction of Lichfield and Coventry. In the first place, that fact is not admitted nor fully established; but assuming that such is the fact, it follows that the Bridgnorth probate would not reach to those effects; but does it therefore follow that a prerogative probate is necessary? Would not the diocesan jurisdiction have a right to grant probate; and is not the ques-



tion of the jurisdiction to which he shall resort, rather a matter open to the choice of the executor? Upon the principle of the case of *Scarth v. The Bishop of London's* registrar, I think there is a concurrency of jurisdiction when a person dies in a foreign jurisdiction (as in York, Scotland, or abroad, and, by analogy, in a royal peculiar,) and leaves goods only in one diocesan jurisdiction, within the province. In that case, either the diocesan jurisdiction may grant the probate as the goods are there (a), or the metropolitan may, because the party did not die within the diocesan jurisdiction; but probably that is not a point which the parties are disposed to try, nor is the Court bound to decide it under the present protest.

The question here is rather between the royal peculiars and the prerogative. The executors are called upon to bring in the will; they protest against being bound so to do. They show that they have proved the will at Bridgnorth, which is a royal peculiar and where the party died; they have therefore taken a proper probate, and the will is properly deposited. If the deceased left goods in several diocesan jurisdictions or peculiars, not being royal, so as clearly to require a prerogative probate, the executors even then could not be called upon to bring in the will. Probate here could only be taken upon an office copy or exemplification, as in the case where probate has been taken in the province of York. I allow the protest and dismiss the parties.

(a) *Griffith v. Griffith*, Sayer, 83, and the cases cited in *Scarth v. Bishop of London*, 1 Hagg. 625.

### In the Goods of JOHN REITZ.—p. 766.

The Court refused to grant administration cum test ann. to A. B. as the attorney of the Orphan Board at the Cape of Good Hope acting on behalf of the next of kin, but subsequently granted it to a creditor, the next of kin having been cited by a decree on the Royal Exchange.

THE deceased, a lieutenant under the command of Captain Owen, R. N. died in May, 1824, on the coast of Africa, a bachelor, leaving three brothers and a sister, his next of kin. By his will he gave his property to Miss Stanley, but appointed no executor nor residuary legatee. Conformably to the laws of the Cape of Good Hope, two of the deceased's next of kin, there resident, placed his affairs under the management of the Orphan Board, (the President and members of which became officially executors and administrators of the effects,) which, in November, 1825, by power of attorney authorised Captain Owen, (with the concurrence of the next of kin,) to collect the deceased's property; and after a settlement of his account with his agent Mr. Stilwell, to pay over the balance to Miss Stanley. Captain Owen's absence from England, and other circumstances had hitherto prevented his making the present application. The property was £220.

*Lushington*, referring to the necessary documents, and stating that justifying security would be given, moved for administration, with the will annexed, to Captain Owen, as the attorney of the Orphan Board, acting on behalf of the next of kin.

*Per Curium.*

It would be quite irregular to grant this administration to a nominee

of an official board at the Cape of Good Hope- The property is to be here administered; and there are several next of kin. Why does not Mr. Stilwell, who is a creditor, apply for administration, on citing the next of kin? Why does not the attorney of the next of kin, or the legatee, take administration? There are all these regular ways, and yet the Court is asked to do what seems very irregular.

Motion rejected.

On the third session of Hilary Term, the next of kin having been cited by service on the Exchange, notice was sent to the legatee, and on a proxy of consent from Captain Owen, the Court granted administration to Mr. Stilwell.

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In the Goods of ANNE DORMOY.—p. 767.

A domiciled Frenchman having of his will appointed an executor but no residuary legatee, and administration cum. test. ann. (granted, after citing the executor, to the son's attorney in 1828,) being brought in, the Court, doubting whether it ought not to require the ambassador's certificate, ultimately on justifying security and on the French consul-general's certificate, (confirmed by an affidavit) that by the French law the next of kin was entitled to the residue, granted the administration to the son without citing the nude executor, he having never applied for the grant, though the deceased died upwards of thirteen years before.

THE deceased, a widow, died in November, 1818, in the West Indies: she left four children, and of her will appointed Cremony, her son-in-law, sole executor; but except as to bequeathing to several of her slaves their freedom, she made no disposition of the property. Cremony, having assigned over all his interest in Mrs. Dormoy's estate to the eldest son, declined to interfere further in her affairs: and after being cited by a decree of this Court, administration in 1828 was granted with the will to the son's attorney. The attorney became a bankrupt, and brought in the administration, which was now prayed to be granted anew to the son: but it was objected in the registry, that the residue being undisposed of, Cremony, as nude executor, was entitled to the grant. To meet this objection, the son made an affidavit, "that the French part of the island of St. Martin in which the deceased was domiciled, was, and is, subject to the laws of France: that by the 913th article of the code, no person leaving three or more children at his death, can dispose by will or deed of more than a fourth part of his effects: and by the 1025th and 1026th articles, a testator may name testamentary executors, and may give them the possession of his moveables, but that such possession cannot continue beyond a year and a day from his decease; and if he has not given them such possession, they cannot claim it." That the deceased's will was executed according to the French law; and by that law, Cremony ceased to be executor at the expiration of the year and day, and could no longer interfere with the estate.(a)

*Lushington* moved for the administration.

*Per Curiam.*

If the law of England prevailed in this case, there might be a doubt whether Cremony would not be entitled, as nude executor,(b) to

(a) The French consul in London certified, that the French part of the island of St. Martin (W. I.) was effectively governed by the French laws; and that the affidavit set forth the law with perfect accuracy, and in entire accordance with the articles of the code therein recited.

(b) See however, 1 W. IV. c. 40, cited in *notis*, sup. 205.

the administration : but as the law of France governs the succession, the residue is undisposed of, and the son as one of the next of kin, is entitled. My difficulty is, whether I have sufficient evidence of the French law. The absence of any application for the grant on behalf of Cremony during the long interval of time that has elapsed since the death of the party, is confirmatory of the correctness of the son's affidavit and of the certificate. But is the certificate of the French Consul General sufficient proof of the law : should not the Ambassador himself have certified ? That might have been considered as adequate authority on such a point (a). Under all the circumstances, however, I will grant the administration ; but as there are other parties in distribution the securities must justify. As the case is governed by the law of France, there is no occasion further to cite Cremony.

(a) *Lushington*.—The authority of the consul-general as to the law has been considered sufficient in similar applications.

### FIELDER and FIELDER v. HANGER.—p. 769.

*Administration de bonis non* to a feme covert granted to the representatives of the husband, an appearance having been given and administration prayed by the next of kin of the wife. The Court directing that though the modern practice had been otherwise, such grants should for the future pass to the husband's representatives, unless cause to the contrary was shown.

THIS was a cause of granting administration to the executors of Philip Leader of certain effects of his late wife left unadministered by him : an appearance having been given for, and administration prayed by, the niece and one of the wife's next of kin, the executors alleged in act on petition, that in June, 1812, in contemplation of marriage, Leader and Mrs. Dawson signed an agreement, that her property should on the marriage pass to Leader, save as to "her moneys in the funds which shall be for her separate use to all intents and purposes as if she were sole and unmarried, and that the same shall be conveyed to trustees, and a proper settlement executed." That no settlement was made, but the marriage took place, and on her death in June 1828, she was possessed of personal estate consisting of 2475*l.* in the four per cents, and some Long Annuities standing in her name of "Dawson."

The proctor for the niece having returned the act unanswered, *Lushington* moved that the grant should pass to the husband's executors. It was true that the modern practice had been different, but as all the interest was in the representatives of the husband, they were the parties best entitled to the grant. All the cases were collected in Vol. I. Hagg. Ecc. Reports. 341—8, and Vol. II. Appendix 158—170.

*Per Curiam.*

Those cases show that there have been contradictory decisions on the point. On the principle, however, that the grant ought to follow the interest, and that the whole interest is vested in the husband's representatives, I shall decree this grant. I should have done the same, if the husband had not taken out administration, unless it could be shown that he had not the interest, but that the property belonged to the wife's next of kin : and it will be understood in the Registry that this is to be the rule for the future unless special cause to the contrary be shown.

Motion granted.

LONG and FEAVER v. SYMES and HANNAM.—p. 771.

Any acts, which show an intention to take upon them the executorship, prevent executors renouncing: therefore the insertion of an advertisement calling upon persons to send in their accounts and to pay money due to the testator's estate to A. and B., "his executors in trust," held to make them compellable to take probate, and to subject them personally to the costs occasioned by their resistance; the estate being small and left for two years and a half without a representation.

If a person named executor intermeddles, however slightly, he cannot afterwards refuse to take probate, and if not named executor, he becomes so de son tort; but acts of necessity do not bind, and even if an executor has shown himself willing to accept, he may by the Court be dismissed in aid of justice.

An informal declining by letter to take the office of executor is insufficient. Till the refusal is recorded in Court, no person can take the administration.

THIS was a proceeding by two legatees under the will of John Feaver to compel the executors to take probate, alleging that they had intermeddled: and the question was, whether they had so intermeddled as no longer to be entitled to refuse. The facts of the case as stated by the legatees were these.

John Feaver died on the 17th June 1829, leaving a will dated on the 11th of June 1829, of which the defendants were the executors. On the 29th of July and on the 3rd of August the following advertisement was inserted in the Sherborne paper.—"All persons who have any claim on the estate of the late John Feaver of Horsington, in the county of Somerset, deceased, are requested to send their respective accounts and are desired to pay all money due to the said estate without delay to Mr. Symes of Combe Farren in the county of Dorset, or to Mr. Hannam of Darkhourbour, in the county of Somerset, his executors in trust." It was alleged further, that Symes and Hannam applied to several persons for payment of their debts, particularly that Symes applied to one Hiliar, and on the 20th August received of Allan 20*l.*, for which sum Symes and Hannam opened an account, as executors, with a banking house, and which sum was afterwards withdrawn by Symes. That Symes and Hannam received and paid other moneys; and on the 17th June 1831, signed an authority to Melmoth, a solicitor who had possession of the will, to deliver it up to another solicitor, Newman.

In reply it was alleged that soon after the deceased's death Symes informed the widow and Feaver that he would not act; that on the 4th of July 1831, he and Hannam renounced by proxy, and steps were taken to obtain administration for the widow and George Feaver the residuary legatees; that the advertisements were inserted because the widow was receiving the debts; that Symes applied for no debt but Allan's, though he delivered small accounts to two or three persons; that on the 20th of August he received 21*l.* of Allan for the widow, and deposited that sum at the bankers to the credit of the deceased; that on the 17th of June he signed the order for the delivery of the will, but afterwards countermanded it. Hannam did not deny that the advertisements were inserted with his privity, nor that he signed the order on the 17th of June, but he denied that he applied for or received any debts.

*Lushington* for the legatees.

The principle of law is quite settled: whoever has intermeddled as an executor cannot repudiate the duties: he has made his election. *Swinburne*, part 6, § 22. Therefore any interference with the property of the

testator binds an executor to the office. Both the executors have brought themselves within the two general rules laid down in Bacon's Abridgment, Tit. Executors (E), 10. In *Edwards v. Harben*, 2 T. R. 597, Buller, J. says, "Every intermeddling after the death of the party makes a party so intermeddling an executor de son tort." The advertisement was a notice to the public that they were executors; and according to all the rules, principles, and precedents, amounted to an acceptance. If after such an act a party can retract and disavow his intentions, there would be no safety for creditors or legatees. If this and the other acts alluded to do not bind, I know not what will.

*Addams* for Symes.

Directing the funeral, making an inventory of the property, advancing money to pay debts or legacies, or other offices merely of kindness and charity do not make a man an executor de son tort, Toller, p. 41; nor consequently bind a rightful executor to take probate. Symes did not receive the debt qua executor, but for the widow as administratrix. All the acts done are merely of humanity, kindness, and charity. Besides, the Court has a discretion to exercise. It is not bound to compel these parties to take probate.

*Nicholl* for Hannam.

No case has been cited to show that any acts prevent the renunciation of a rightful executor which do not make a stranger executor de son tort. Now an executor de son tort is one liable to answer out of his own goods for the testator's effects which come to his hands; and therefore must not only have intermeddled with the office, but must have intermeddled with, i. e. got possession or disposed of, the effects of the deceased, as in *Edwards v. Harben*. Hannam never intermeddled with the effects; he only, while deliberating, inserted the advertisement; and an executor may investigate the state of the testator's property before he accepts or refuses, Godolphin on Wills, 102. Even after having been sworn, executors have often been allowed to renounce. In *Orr v. Newton*, 2 Cox, 274, the acts for which the executor was not held liable were much stronger.

JUDGMENT.

SIR JOHN NICHOLL.

[After stating the substance of the act on petition on either side.] The question then is, whether there has been such intermeddling as to render the executors compellable to take probate? There is no doubt on the law that if a person named executor intermeddles, he cannot afterwards refuse to take probate; and if not named executor, he becomes so de son tort. There are certain acts of necessity, such as feeding the deceased's cattle and the like which do not bind a party; and if a party even has shown himself willing to take upon himself the execution of a will, he may, in aid of justice, be dismissed by the Court, in order to become a witness (a); but otherwise slight circumstances are obligatory and sufficient to compel a person to take probate if really executor, or to render him executor de son tort, if not really executor. Swinburne in several passages lays down the obligation, and says (part 6, s. 22), "he must beware not to administer the effects as executor." He is compellable "when he does those acts which are proper to an executor." "The

(a) *Panchard v. Weger*, 1 Phill. 212. *Jackson v. Whitehead*, 3 Phill. 577. See also *Meek v. Curtis*, 1 Hagg. 139. *McDannell v. Prendergast*, supra, 212, and Williams' Law of Executors and Administrators, Vol. I. 148, as to cases where an executor may refuse the office.

most safe course is not to meddle at all, but utterly to abstain :” “ the refusal cannot be by word only, it must be entered and recorded in Court.”

This doctrine is laid down no less strongly in several books of common law. In Bacon’s Abridgment (Executors (E.) 10; also Roll’s Abr. 917,) it is said, “ What acts amount to an administration, so that a party cannot afterwards refuse.” “ 1st, Whatever an executor does which shows an intention in him to take upon him the executorship, will regularly amount to an administration.” “ 2d, Whatever acts will make a man liable as an executor de son tort, will be deemed an election of the executorship.” In *Edwards v. Harben*, 2 T. R. 597, Mr. Justice Buller says : “ He can be charged as executor, because any intermeddling in the testator’s effects makes him so : every intermeddling after the death of the party makes the person so intermeddling an executor de son tort.” If such acts will make a man executor de son tort, a fortiori it will render an executor compellable to take probate.

What then are the facts? Have the executors done anything that showed an intention on their part to take upon them the executorship? It is unnecessary to go one step further than the advertisements; nothing can be a more strong intermeddling than the insertion of such an advertisement, and expressly in the character of executors. It does not merely “ show an intention to take upon them the executorship,” but it is an absolute acceptance of the executorship. Nor was this done by Symes alone, for Hannam admits that it was done with his concurrence; that it was their joint act; and after this concurrence the acts of Symes in a great degree bind Hannam.

They subsequently make inquiries, and they find that the executorship may turn out a troublesome business, and then they give notice to the family that they will not act; the matter lies dormant till the following year, when in answer to an application by letter they decline to undertake the office. That was too late in time and insufficient in form—“ the refusal must be recorded in Court :” till that was done no person could take administration. They should have decided at once; they might have delivered up or brought in the will and given a proxy of renunciation. As the authorities point out, they should “ beware” how they do slight acts. I think they have not been cautious; they should not have first acted and given notice to the debtors to the estate, and afterwards leave the substituted residuary legatees without that protection for their legacies which the testator intended. For two years and a half they have left this estate, though small, without a representative or any person even to collect the debts.

I am of opinion that the executors have so far intermeddled as to be compellable to take probate, and that their resistance subjects them personally to costs, which certainly ought not to be paid out of the estate without the consent of the residuary legatee and substituted residuary legatee; nor till after the legacies which have been put in jeopardy by the conduct of these parties have been discharged.

The Court condemned the executors personally in costs, and assigned them to extract probate before the by-day.

## DANIEL v. NOCKOLDS.—p. 777.

A latter will, disposing of realty and personalty, containing a clause of revocation and uncancelled, is not revoked and a former will revived by reading over the former will, and by parol declarations, unaccompanied by acts that it was his last will,—the former will being found carefully deposited and locked up in a drawer, and the latter will, though in the same drawer, lying among useless papers; and all the devises and legacies lapsed.

ROBERT NOCKOLDS died in June 1831, leaving his half-brother sole next of kin; and a personalty of 800*l*. By his will of November, 1819, attested by three witnesses, he gave this brother 100*l*., and after bequeathing further legacies left the residue to Mary Tomkins, and appointed Mr. Daniel, his medical attendant, and Mr. Bush executors, but without a legacy to either. In 1823 he made a new will, in which he devised a small freehold to Tomkins, and appointed Parkinson executor and residuary legatee. This will contained a clause of revocation, and was duly executed. Both Tomkins and Parkinson died in the testator's life time: and an allegation was now offered to set up the will of 1819: it pleaded, that in April 1827 the deceased lodged with Mrs. Seabrook, at Colchester, and continued there till his death: that on several occasions during his last illness he conversed with her, her daughter, and others respecting his affairs, produced and read to them his will of 1819, declared that it was his last will and what he wished to be carried into effect; and that after the executors, (one or either) thereby appointed, had been with him, he told the Seabrooks and others that they were his executors, and would have the management of his affairs: that after his death the will of 1819 was found carefully deposited and locked up in one of the drawers in his bed-room, and that of 1823 at the bottom of the same drawer, but much soiled and crumpled amongst old and useless papers.

*Addams* in objection to the allegation.

Every legatee, I understand, under the will of 1819, is dead.

*Lushington*.

Not so. Tomkins' brother, a legatee in 200*l*., is alive.

*Per Curiam*.

Can you produce a case of a latter will, with a revocatory clause, remaining uncancelled, and in the same drawer with a former will, set aside on the ground of a republication of that prior will by mere declarations?

*Lushington*.

That amounts to a question what will effect a republication of a will of personalty. In wills of personalty no particular form of republication is necessary. *Miller and Ross v. Brown*, 2 Hagg. 210. That was a case, indeed, of a will made by a wife during coverture: but there is no material distinction as to a republication in such a case, and the present—where there are two wills. The principles there laid down are generally applicable to all wills of personal estate; and constitute the true doctrine of Courts of Probate.

JUDGMENT.

Sir JOHN NICHOLL.

The law, in my judgment, presents insuperable objections to the admission of this allegation. It is not like the case of a later cancelled will, because then the very act of cancellation revokes the latter, and lays a foundation for an inference that the testator intended the former will to

operate: but here is a latter revocatory will entire and in force as a revocation of the former, though the devises and bequests may have lapsed. Can the former will be revived without an act of republication, or indeed of re-execution; or rather, can the latter will be revoked by mere declarations? If it were merely a will of realty, it clearly could not have been contended that there had been a republication of the former will, because the words of the 6th section of the statute of frauds are express, 29 Car. II. c. 3, s. 6. It is clear also, under s. 22, that the latter will could not have been revoked by mere declarations unaccompanied by some writing: but here is no declaration in writing; nothing reduced into writing during the deceased's life-time; nor are there any acts: the circumstances of the finding are too slight—they might be merely accidental. The latter will was in an envelope; and there is no appearance that it was rumbled,—why did not the deceased, a professional man, cancel if he intended to revoke it and revive the former will? Declarations without acts are always dangerous evidence: they are frequently insincere—liable to be misapprehended—not accurately recollected. The case of *Miller and Ross v. Brown* does not apply. In that case there had been no revocation: all that was there required was to show adherence. In this case there is an express revocation, and that revocation is to be removed by parol—that is the difficulty. I must reject this allegation, and decree administration, with the latter will annexed, to the brother.

Allegation rejected. Costs out of the estate by consent.

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#### YOUNGE v. SKELTON.—p. 780.

In a suit for inventory and account and to make distribution, on application that an administration bond should be pronounced forfeited, on the ground of a devastavit by the administrator's appropriating the property to his own use, that the bond might be delivered out of the registry in order to be put in suit against the sureties, the Court (a declaration instead of the inventory and account being allowed) referred to the registrar to report what residue remained to be distributed, and to allot portions; and on such report (which was not objected to) assigned the administrator to pay to each distributee his respective share, and, the administrator alleging that he had become bankrupt and obtained his certificate, directed the bond to be attended with, but declined to pronounce it forfeited.

THIS was a cause of inventory, account, and allotment of portions of the effects of Charles Schweitzer, promoted by the administratrix of the natural and lawful brother of one of the next of kin of the deceased against his administrator. The citation issued on the 13th, and was served on the 14th of June, 1831. The deceased died on the 17th of November, 1828, and shortly afterwards his brother died; and on the 1st of June, 1830, administration to Charles Schweitzer (Mrs. Choppin, the other next of kin, having renounced,) was granted to John Henry Skelton, the father and guardian of his minor children, nephews and neices of C. Schweitzer, for their use and benefit. The property was sworn under 25,000*l*. This administration expired on the 21st of July, 1831, by reason of Skelton's son being then twenty-one. Mrs. Choppin's distributive share had been previously paid. On the 1st of June, 1831, Skelton became a bankrupt; a commission issued on the 7th, and on the 19th of August, he obtained his certificate, which was confirmed on the 15th of September.



An allegation having been given in on behalf of Miss Younge, Skelton, in his answers, admitting that he had of the deceased's estate converted to his own use 10,875*l.* 8*s.* 9*d.*, submitted that his certificate discharged him from the payment thereof.

On this day, the proctor for Miss Younge prayed the declaration instead of an inventory and account to be allowed, and to order a decree to issue against George Robertson; (the surviving surety in the bond entered into by the administrator,) to show cause why the bond should not be pronounced forfeited and attended with for the purpose of being sued upon at common law. The proctor for Skelton prayed the conclusion of the cause to be rescinded to permit him to bring in an allegation.

*Addams* for Miss Younge.

The bond is forfeited on the ground of a devastavit. There is proof of a complete conversion of property to his own use; then the breach of the bond assigned will be such devastavit; for a next of kin may sue the sureties on the bond and assign devastavit as a breach, though a creditor may not; for that is the effect of what was said by Lord Holt in the *Archbishop of Canterbury v. Willis*, 1 Salk. 315, 16. In this case the administrator being a bankrupt, the Court could not make an order on him to allot portions. The Court must pronounce the bond forfeited.

*Lushington* and *Dodson* contra.

The administrator in his answers does not deny the devastavit, but it is quite impossible to sue him, because having been a bankrupt his certificate is a bar. The practice of late has been not to pronounce the bond forfeited, but to direct it to be attended with, leaving to the court of common law to decide upon the question of forfeiture.

JUDGMENT.

Sir JOHN NICHOLL.

This is a case of considerable importance in respect to the practice of the Court and the interest and convenience of suitors. If from the rare occurrence of such cases, more especially in modern times, some difficulty should have arisen and some errors and irregularities have taken place, no blame attaches to any party, though it is most desirable that a correct mode of proceeding should be established as a precedent for future cases.

The present is a suit for an inventory and account and to make distribution, brought by a party in distribution against an administrator. In such a case, the form of proceeding (when rightly understood) is plain and simple, and might afford a very convenient and expeditious mode of attaining justice; but if errors and difficulties are interposed, parties may be induced or driven to resort to other jurisdictions.

The statute of distributions (22 and 23 Car. II. c. 10.) which is the only authority under which the Court now acts, provides in the first three sections, that ordinaries who have power to grant administrations shall take bond with two or more able sureties; it then sets forth the form and condition of such bond, (see also 4 Burn Ecc. Law, 286,) and enacts that ordinaries shall have power to call administrators to account, and to make distribution of the residue among the parties entitled. Under the provisions contained in these sections, the administrator is to perform and to give bond with sureties for performing the following matters:

1st. To exhibit a true and perfect inventory.

2d. To administer the effects, that is, to collect the assets and pay the demands and expenses.

3d. To exhibit the account of his administration.

4th. To pay the balance, found remaining after the accounts have been examined and allowed by the Court, to such persons as the Court shall assign as entitled in distribution.

5th. To deliver up the administration if a will shall appear.

These are the five conditions under which the bond is given, and on the performance of which the bond is satisfied.

The statute further enacts in s. 8, that no distribution shall be ordered till after the expiration of twelve months from the intestate's death. This provision is for the purpose of affording an opportunity to creditors to recover their debts, and to the administrator to collect the property and to discharge all claims thereon. The mode of proceeding under this statute is obvious and plain, if the statute itself and the terms of the bond are duly attended to. The mode of calling for an inventory and account is so much a matter of every day's practice that it need not be particularly described. It may be proper, however, to consider what is to be done if they are called for by a party in distribution who means to proceed to enforce distribution. Objections may be taken to the inventory and to the account. In that case the objections must be stated in an allegation, and proof be given thereof; or the party may proceed by petition and affidavit, till the Court decides that the inventory and account are sufficient and allows them: but if the inventory and account are not objected to, the administrator prays they may be admitted and allowed, which prayer the Court accordingly grants.

The inventory and account, then, not being objected to, or after objection being allowed, what is the next step? To refer them to the registrar to examine and report what is the residue or balance remaining to be distributed according to the statute, and to allot portions; that is, to report what is the share of each person in distribution, previously deducting all necessary costs and expenses which ought to be first paid.

The registrar's report is of course open to objection, but when confirmed by the Court the next step is to assign the administrator to pay to each person, reported to be entitled, the share which has thus been limited and appointed, and to enforce that payment by the compulsory process of the Court, unless sufficient cause be shown against enforcing its order. The administrator and his sureties ought to obey that order, but their bond cannot be put in force against the sureties in this jurisdiction.

This, I apprehend would be the regular course of proceeding and its several stages in any ordinary case: it seems quite plain and obvious; and, as far as I have been able to ascertain from considering the statute and from looking through the cases, it was the old mode. Special circumstances may however arise in each of these stages. The inventory may be objected to—that property has not been entered; the account may be objected to—that payments have been made or debts entered which are not properly to be charged against the estate. The right of the party as being in distribution may be denied. The registrar's report may be objected to; the liability of the administrator may be denied: but whatever circumstance of that kind may occur, the objection should be taken at the proper stage. Injury may be done to the other

party by interposing the objection prematurely, or the party may defeat himself by irregularity ; and it is always the duty of the Court, in case the matter falls under its notice, to prevent irregularity for the sake of other suitors.

To come then to the circumstances and proceedings in this particular case. Mr. Schweitzer died in November 1828, a bachelor, and intestate, leaving one brother, a sister, and several nephews and nieces. There was a contest about his will, so that no administration was taken till June 1830, when Skelton became administrator : and in June 1831 he was cited, at the suit of Elizabeth Younge as guardian of a party entitled in distribution, to exhibit an inventory and account, "and to see portions allotted, and distribution made according to the statute." If there existed any objection to that inventory, such as omisssa, a wrong valuation or the like ; or to the account, such as want of vouchers, fraudulent charges, or the like, that was the time to take such objections ; but if no objections were taken, the proctor for the administrator ought to have prayed that the inventory and account be allowed, and the proctor for the party in distribution to admit their correctness, or not objecting to their allowance, to pray that they be referred to the registrar to ascertain the residue to be distributed, and the parties to whom the portions should be limited and appointed. Upon his report being confirmed, the Court would order the administrator to pay.

But instead of this course, an allegation has been brought in on the part of Elizabeth Younge, not objecting to the inventory and account, but alleging that it was true and correct, and that a certain balance remained. Answers were taken to that allegation ; the cause was formally assigned for sentence ; and at the hearing, the Court is prayed to allow the inventory and account, and to issue a decree against the surety citing him to show cause why the bond should not be pronounced to be forfeited and be attended with for the purpose of being sued upon at common law :—not to examine the account, nor to pronounce what residue remained, nor to limit and assign portions to the persons entitled.

In giving this allegation, the party, I think, lost her way, and the prayer was premature. No blame attaches to any one, the error has arisen from the infrequency of this course of proceeding. The Court itself, without looking carefully into the statute and old cases and maturely considering the whole, might have felt at some loss. However, as I have said, the allegation and answers were quite useless, and the prayer was premature ; and it is necessary to proceed with due caution as third parties may be affected, and in the present case there are many persons in distribution. If it should be requisite ultimately to proceed against the surety, it should appear by the proceedings in this Court, that there was a breach of the condition after all the regular steps had been taken ; and it should also appear by the proceedings what are the portions allotted to each party. It is convenient and important to bring the matter back to its proper channel, in order to establish a precedent pointing out what the regular practice ought to be, and in order that the rights of all the parties in distribution should be ascertained, and as far as this Court has power, be protected. I shall therefore refer the declaration, the same being allowed and not objected, to the registrar to report the amount of the residue remaining in the administrator's account to be distributed according to law, and who the persons are to whom the portions thereof are to be limited and appointed.

That report having been confirmed, when application shall be made to the Judge to decree payment of the portions or any of them, that will be the proper time on the part of the administrator to show that he is exonerated from payment, and for application to be made against the surety. Before a breach of the bond can be assigned, I apprehend that these steps must be taken. The Court must look to the protection of all parties. Some parties may have received their full distributive shares, and others may have had advances on account. The registrar will of course attend to all these points.

It may not, however, be improper now to observe, that there is one part of the prayer with which the Court will hesitate to comply, unless some decisive authority can be shown requiring the Court to proceed that length; I mean the prayer to pronounce the bond forfeited: by authority, is to be understood either a decision upon the point upon argument, or a series of instances showing that such is the established practice. The bond cannot be put in suit, nor the payment of it enforced in this Court, but it must be sued at law: it only therefore seems necessary for this Court, in aid of justice, to order the bond to be attended with. The plaintiff would then have the same benefit as if the bond were here pronounced forfeited, for it appertains to the Court in which the bond is sued to decide ultimately whether it is or is not forfeited, or in other words, whether any breach has taken place. This point, however, is open to future discussion; the Court now only makes the order already stated.

The following minute was entered:—

“The Judge allowed the declaration, instead of the inventory, the same not being objected to; referred it to the deputy-registrar to report the amount of the rest and residue of the effects of Charles Schweitzer, remaining on the administrator’s account, and to what person or persons respectively the said residue should be limited and appointed, and in what portions allotted; and directed all other matters to stand until the report be brought in.”

1832.

The registrar’s report was made and allowed. On the part of Miss Younge the Court was then prayed to decree distribution of the sum of 10,875*l.* 8*s.* 9*d.* agreeable to the report, and to direct the registrar to prepare an order of distribution accordingly. In objection to this prayer an allegation was brought in. The allegation pleaded the grant of administration to Skelton; and its expiration on the 21st of July, 1831, in consequence whereof he was not amenable to the jurisdiction of this Court. That, as administrator, he had converted the property into money, paid Mrs. Choppin’s supposed distributive share; made other payments as stated in his declaration; and had appropriated the residue to his own use, but from the payment of which he was discharged by his subsequent bankruptcy and certificate.

Addams, in opposing the allegation, admitted that Skelton was a bankrupt.

*Per Curiam.*

In consequence of Skelton, the administrator, having become a certificated bankrupt, he cannot be called upon to make distribution of the balance of the deceased’s effects. I shall, on that ground, decide that he is entitled to be dismissed.

The facts pleaded in the allegation were then admitted in acts of

Court: and on the next session, the Court dismissed Skelton from the suit, and, on motion of counsel, granted a monition against Mr. Robertson, the surviving surety, to show cause why the bond should not be pronounced forfeited, or at least be attended with for the purpose of being put in suit at common law.

An appearance was given for Robertson, and on the 2d session of Easter Term, an allegation on his behalf came on for debate, when *Addams*, in objection, was stopped by the Court.

*Per Curiam.*

I am inclined to direct the bond to be attended with: the party in distribution may then, in the proper Court, show a breach of it. The Ecclesiastical Court, when cases of this nature have been properly considered, has never, I conceive, decided whether there has been a breach of the bond or not: it avoids prejudicing either party. In this instance, it is quite clear that there has been no distribution; and the object of the proceeding here is to enable a party to put the bond in suit. I shall suspend this allegation, and direct the bond, entered into by the surety, to be attended with, and produced at common law, as may be requisite for the furtherance of justice.

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#### WATERS v. HOWLETT.—p. 790.

When probate of a will and codicil, both prepared by the same person, who was also an attesting witness, was called in, and the executor was put on proof of the codicil by a niece, who pleaded incapacity from apoplexy, without suggesting fraud, circumvention, custody, control, or the improbability of the disposition, the Court (having, on the admission of a responsive allegation, strongly intimated its opinion that the opposition was hopeless,) at the hearing, the cause being unopposed, condemned the niece in costs.

CHARLES HENRY RILEY died on the 22d of December, 1829, at the age of sixty-six, a widower; leaving Edmund Waters a brother, and Mary Ann Waters a niece, by the half blood. His property was of the value of 8,300*l*. His will, dated in November, 1826, and attested by two witnesses (of whom Mr. Harris, his solicitor, was one) after giving several small legacies, (among them 40*l*. each to his brother and niece,) left the residue to his wife, and appointed her and Mr. Howlett executors.

In April 1829 his wife died, and in about three weeks afterwards the deceased made a codicil, giving a legacy of 40*l*. to his housekeeper, and the residue to Mr. and Mrs. Price; and confirming the appointment of Howlett as an executor. This codicil, like the will, was also attested by Mr. Harris and by another witness. In January, 1830, the executor took probate both of the will and codicil. After the probate had been outstanding above a year, it was called in by the niece; and the executor, being put on proof of the codicil, propounded it in May, 1831, in a common conditio, on which the subscribed witnesses having been examined, an allegation, in opposition, consisting of twelve articles, charging incapacity, was admitted on behalf of the niece. The present question respected the admissibility of a responsive allegation, consisting of thirteen articles and several exhibits.

*Phillimore*, for the niece, in opposition.

*Lushington* and *Addams*, contra.

JUDGMENT.

SIR JOHN NICHOLL.

[After stating the circumstances before detailed.] The allegation, on the part of the niece by the half-blood, which charges the deceased with incapacity, is very much in the usual form: it gives a history of the deceased; it pleads an attack of apoplexy in June, 1826, (which therefore was prior to the will, which is not opposed), a later attack in 1828, and subsequent imbecility: and then the fifth and remaining articles heap together a number of circumstances which usually, or at least frequently, occur in persons who are subject to apoplectic or paralytic attacks, especially about the periods of those attacks; but which also generally subside after a time, and then the patient again becomes rational and capable. In support of such circumstances, persons who accidentally visit the deceased are usually brought to depose; but their evidence almost universally turns out to be of no weight against acts of capacity at other times, particularly if there is no appearance of fraud in the testamentary act itself.

Such an allegation, of course, calls for contradiction, and necessarily produces a long responsive plea, as in this case: and the evidence taken on both sides, after occasioning much expense, generally leaves the case where it found it,—that is, depending upon the evidence on the conditit as to the instructions and execution, and the state of capacity at that particular time.

Such seems to be the course of the present case; and the party opposing the codicil is apparently involving herself and the deceased's estate in hopeless litigation. The Court is the more strongly impressed with this conviction from a consideration of some of the admitted facts. First, by the death of the wife the bequest of the residue lapsed, and that circumstance would naturally lead to a new disposition of it: and to effect that the codicil is confined. Secondly, the brother and niece were by the will excluded, except that it gave to each a trifling legacy of 40*l*. No particular regard or affection for them is even pleaded; nor is it even averred that they kept up any intercourse with the deceased. The opposing allegation, as I have said, merely sets up incapacity; it does not suggest any fraud, circumvention, custody, control, nor even any improbability in the disposition. Thirdly, the person who draws and attests the codicil is the very same solicitor who draws and attests the will, the validity of which is not questioned.

The opposition has therefore every appearance of being a vexatious experiment. The Court has thus early stated its impression of the appearance of the case, in order to put the niece, Mrs. Waters, upon her guard, for she certainly litigates at the peril of costs, not only of her own costs but of the costs of her opponent, if it should turn out that she has, without sufficient grounds, called in the probate; not even contenting herself with interrogating the witnesses.

The present allegation, being generally responsive and contradictory, is admissible; but upon the whole, I suggest to the niece's re-consideration, whether she will not act more wisely in abandoning her opposition, rather than in persevering at the risk of costs.

The allegation was accordingly admitted: witnesses were examined on it, and on this day the cause stood for hearing, when the codicil being fully proved, the cause came on as an unopposed case, and the Court pronounced for the codicil, directed the probate to be re-delivered out; and, on application of counsel, condemned the niece in costs.

## In the Goods of WILLIAM HILTON.—p. 793.

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*On Motion.*

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**Motion, for an administration limited to a debt due to a bankrupt's estate, and paid into a bank after the death (but not to the credit) of the assignee of such estate, rejected.**

THE deceased died intestate in March, 1831, leaving a widow and a father,—the only persons in distribution. At his death he was sole assignee of a bankrupt's estate, to which there was due, at that time, an outstanding debt of 130*l*. The debtor wished to make payment: but (there being no one authorised to give a legal discharge,) by an arrangement between the debtor's solicitor and the solicitor under the commission the sum was paid into the hands of a banker to their joint credit. A new assignee having been since chosen, the commissioners had declined to assign the sum to him, unless the legal representative of Hilton executed the assignment.

The widow and father were resident in the country,—the latter out of the jurisdiction. No administration had been taken; and in reply to a notice that the assignee proposed to apply for the administration limited to the above sum, they declined to interfere. They had not, however, been cited.

*Phillimore* moved.

*Per Curiam.*

How can the Court grant this motion? If this sum regularly vested in, and in law became the property of, the deceased, then his father and widow are entitled, and they should have been cited, or an appearance should have been given for them. If, however, as would seem to be the case, the money never vested in the deceased, but is the property of the bankrupt's creditors, then the Court has no authority over it.

Motion rejected.





**REPORTS OF CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**ARCHES AND PREROGATIVE COURTS**  
**OF**  
**CANTERBURY,**  
**AND IN THE**  
**HIGH COURT OF DELEGATES:**  
**CONTAINING THE**  
**JUDGMENTS**  
**OF**  
**THE RIGHT HON. SIR GEORGE LEE.**

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**By JOSEPH PHILLIMORE, LL.D.**

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**VOL. I.**

**CONTAINING CASES FROM HILARY TERM, 1752, TO TRINITY TERM,  
1754, INCLUSIVE.**



# CASES

## IN THE

### ECCLESIASTICAL COURTS.

1752.

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PREROGATIVE COURT OF CANTERBURY.

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#### LAMKIN against BABB.—p. 1.

Probate granted of an unexecuted will, the intention of the deceased being clear, and the due execution of the instrument having been prevented by sudden incapacity superinduced by the violent conduct of his wife, who was interested in thwarting that intention.  
 Probate of a will of later date (i. e. the next day,) refused, because it had been extorted from the deceased by the importunity of his wife.

*Dr. Hay's* opening for Babb.—Thomas Lamkin died 1st June, 1751; made will dated 28th May, 1751; left his estate equally between his wife and two children; made William Bristow and John Babb executors; Bristow renounced; Babb a nude executor; Cutlove, a school-master, sent for on 28th May to make his will; wife said no will should be made till a friend of hers was present; Bristow sent for by her; none present at making it but Cutlove and his son and Bristow; deceased directed his estate to be equally divided between his wife and two daughters; proof of instructions; directed Bristow to be executor; named him himself; Bristow would not take it alone; Babb was then proposed and agreed to, when the will was finished; the family sent for to see him execute it. Wife said it would not do without setting his name, and opposed its being executed. Cutlove said he had set his mark, and that was sufficient, and so it was no further executed. 29th May wife sent for Allen, and proposed to him to make deceased's will. Allen asked him if he should make his will; deceased said "Yes;" affection to daughters; deceased under custody of his wife, when second will made. Clergyman who was with him immediately after says he was not sensible.

*Dr. Jenner's* opening for Lamkin.—Deceased made a will before his last marriage, in which he leaves a great deal to his now widow, Mary Lamkin, the party; no proof deceased had animus testandi on 28th May; he was under the direction of his daughters on that day. Bristow and Cutlove differ: Bristow says deceased told Cutlove he sent for him to make his will. Cutlove contrary; deceased gave no other instructions but only said "All alike." Cutlove junior wrote the will, except the exordium, which was written before Cutlove came; deceased did not voluntarily appoint Babb executor; witnesses differ about what

deceased said concerning legacies to his executors; admit Cutlove proves reading the will to deceased, and that he made his mark to it, and then he rambled in his talk. Bristow says Mrs. Lamkin attempted to snatch the will out of Cutlove's hand, but he says otherwise himself. Bristow says deceased was of sound mind all the time; Cutlove speaks only to the time of giving instructions; last will reasonable; both his daughters married and provided for by him; gave 50*l.* to one daughter, and a 100*l.* to the other. Inventory about 200*l.* only; affection to wife; on 29th May deceased perfectly sensible; Allen was not sent for, but came accidentally to visit deceased, and conversed with him several hours; no evidence of deceased being in his wife's custody; she asked him to make a will; he said "Yes." Allen asked him if he would make his will to his wife; he said "Yes." Allen wrote it and read it to deceased; he executed it, and delivered it to his wife, and soon after said, "Molly if you are satisfied I am content." Deceased had no recollection that he had made a will the day before; all the three witnesses to last will fully swear to capacity then; exceptions to Jenkins upon his declaration to Marshall; Marshall has evidently sworn false; the will made on 29th May an hour before Allen the clergyman came to deceased; he says deceased appeared stupid, but he had no discourse with deceased and only prayed by him.

#### Evidence for Babb.

1. Charles Cutlove.—28th May, 1751, deponent and his father went, being sent for, to make deceased's will; Babb and others were present; deceased's wife said no will should be made without a friend of hers being present; she sent for Bristow; Cutlove asked deceased if he knew what he was come for; deceased said "No:" Cutlove said, to make his will; deceased said he would make his will with all his heart; directed his estate to be given to all equally; deceased named Bristow executor; he declined being executor alone; Cutlove asked him if he would make Babb executor; asked him if he would leave executors any thing; deceased said "Yes;" Cutlove asked him if he would give them a guinea each; deceased said it was too much; will was read to and approved by deceased; deceased said he was going to write his name to his will; he made his mark to it as he lay on his side, but his senses then failing him, nothing more was done; he was of sound mind till after he had made his mark.

5. Int. Will read to deceased by respondent's father, and he expressly approved it, respondent did not sign it.

2. Edmund Cutlove.—Oesland came to deponent and told him deceased wanted deponent to make his will; says deceased's wife made a great disturbance and opposed deceased's making a will; deponent asked him if he intended to make a will; he said "Yes;" deponent asked him in what manner he would dispose of his estate: "Will you leave more to your wife than to your children, or the contrary; or are you disposed to leave them all equal;" he replied, "All alike;" deponent asked him who he would make executors; deceased said, his father, Babb, and Mr. Bristow; deponent made will accordingly; read it distinctly; deceased well knew the contents, and approved of it; the wife and others were called up, and then deponent sealed the will, and carried it to deceased to execute; deceased then said it was his will; he being weak, he could not sit up in his bed; somebody called out to deceased, and said, "What are you going to do?" he replied, "To write"

my name;" he was asked to what; he said, "My will," and then made his mark and then immediately said, "What am I going to do? is this Whitsunday?"—upon which deponent would do no more, thinking he was not then sensible, but he was sensible till he had made his mark.

2. Int. Oesland, who fetched deponent, said deceased was perfectly sensible. 3. Int. Respondent did not witness the will, because the wife opposed it. 4. Int. Deceased did not tell deponent he sent for him to make his will. 5. Int. Proves reading and approving the will.

3. William Bristow.—Deponent was sent for by deceased's wife on the 28th May, 1751; she said to deponent, "They have persuaded my husband to make a will," and desired deponent to be her friend, and do the best he could for her; she and others made a great noise, upon which they were desired to go down stairs; deponent then said to deceased, "You have a wife," he replied, "I know I have, and I have two daughters;" gives the same account of the instructions as the other witnesses, except that he deposes deceased said he would leave executors nothing; proves reading and approving will; verily believes deceased would have executed his will, if his wife by her noise had not prevented him; she attempted to snatch the will out of Cutlove's hand; swears to entire capacity.

5. Int. Proves reading and approving.

Will read, dated 28th May, 1751.

Evidence for Lamkin.

1. Thomas Allen.—29th May, 1751, deponent went to deceased's house to ask him how he did; staid with him some hours, and then deceased's wife asked deceased to make his will; he said "Yes;" deponent asked him if he was willing to make his will to his wife; he said, "Yes;" deponent wrote will dated 29th May, and read it to him; he approved it, and executed it, and delivered it to his wife, but said nothing to her; afterwards, deceased said to her, "Molly, if you are satisfied I am content;" deceased perfectly in his senses.

2. Int. Deceased's street-door was bolted and locked while will was making, by his wife's order, and his daughters were refused admittance.

John Jenkins.—29th May, Allen and Hargrave and deponent were with deceased; deposes that deceased declared he knew nothing of his having made a will the day before; she asked him if he was willing to make another will; and he said, "I will;" upon which she desired Allen to make a will in favour of her; Allen then asked deceased if he was willing he should make a will in favour of his wife; he answered, "Yes;" Allen then wrote the will and read it to deceased, and asked him if he approved thereof; he replied, he did, and said he would sign it; he did then set his mark, and executed and published it, and then the witnesses attested it; deceased perfectly sensible.

1. Int. Deceased said to deponent, "Jack, are you going to sign it?" deponent said, "Yes;" deceased replied, "Very well." 2. Int. Street-door was bolted by producent's order, and his daughters were refused admittance; the parson staid some time at the door; Parson Allen, when he was let in, said to his brother Thomas Allen, "I hope you have not been meddling in family affairs;" and he answered, "No." 4th. Int. Does not remember he declared to Marshall as interrogate.

3. Elizabeth Hargrave.—Producent asked deceased if he would make his will to her; deceased said "Yes;" proves reading, approbation of the will and execution, attestation and capacity.

1. Int. Agrees with Jenkins. 2. Int. Respondent locked the street door without orders from producent, that she might have time to talk with deceased. 5. Int. Respondent is sister to producent.

Evidence for Babb on second allegation.

1. Robert Calvert.—Proves deceased's affection to his daughters, and that deceased said he thanked God he had lived to see them settled in the world.

2. Int. Believes deceased gave some portions to his daughters.

2. William Marshall.—Proves affection to his daughters, and their dutiful behaviour; deponent saw Read, Mr. Allen, and the deceased's daughters and their husbands, waiting at deceased's door, and a woman from the window said they were busy; Jenkins told deponent a day or two after deceased's death, that he had persuaded his mistress to get another will made, and to send for Mr. Allen for that purpose, and that he and Mr. Allen had done the trick, and, by God, they had flung them; deponent said, "I suppose your mistress will pay you well for what you have done;" he replied, Yes, she had promised so to do, but he could not tell what he should have, for it was to be given to his father the next Sunday.

2. Int. The daughters have a freehold estate. 3. Int. Jenkins said they had cooked them.

3. William Allen, Clerk.—Proves great affection to the daughters; deponent waited a few minutes at deceased's door, and was then let in; deponent said to his brother, Thomas Allen, "What brings you here? I hope you have not been interfering in family affairs;" he replied, "No, I have been doing nothing;" deponent then prayed by deceased; he appeared very stupid, and believes he was incapable of doing any serious act; deceased did not speak to deponent.

4. Int. Deponent asked him how he did, and then went to prayers; deponent had no conversation with deceased, and cannot say whether he was entirely senseless.

4. John Norris.—Proves affection to daughters, &c.

2. Int. Respondent has heard deceased gave his daughter Clark 50*l.*, and to his other daughter 100*l.*, and they have a small freehold by his death.

*Dr. Hay's* argument for Babb.—Babb was not present when will of 28th May was writing; the motion for second will came from his wife; Allen says deceased only said he was willing to make his will to his wife, by which deponent understood he meant to give all to his wife.

*Dr. Bettesworth*, same side.—No proof of alteration in deceased's intention; no declaration previous to the last will: Swinburne, part 2, (a) sect. 25, will not good made at interrogation of a suspected person: 7th part, sect. 4, the same.

*Dr. Jenner* and *Dr. Smalbroke* contra, for Lamkin.—The exordium of the will of 28th of May was brought ready wrote: proper question is, whether either of these wills are good? Deceased told his wife if she

(a) So it is if the testator being sick, his wife neglect to help him, or to provide remedies for the recovery of his health, and nevertheless in the mean time busily apply him with sweet and flattering speeches to make her executrix, or to bestow his goods on her, for in this case the disposition is ineffectual. Swinburne, part 7, sect. 4.—And in another place the same author lays it down; the sixth case is where the testator had made another testament before, for then latter instrument made at the instigation or request of another person, is not good in prejudice of the former.—See also *Green v. Skipworth and Others*, 1 Phill. 53. [1 Eng. Eccl. Rep. 32.]

was satisfied, he was content. *Wilde v. Sir Brownlow Sherrard*. Will prepared by Wilde; nobody present but deceased and the writer; he deposed to reading, and two others to execution; great weakness proved; Dr. Bettsworth, the judge, said he must pronounce according to the evidence for capacity. Deceased in this case looked on his daughters as provided for; Calvert says, a month before his death deceased thanked God he had lived to see them married and settled.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion, that it appeared from the evidence that the first will of 28th May was made agreeably to deceased's intention, and that he was then capable, and approved of it, and would have executed it, if the noise and disturbance his wife made had not thrown him into a sudden incapacity; and I was of opinion, that the will of 29th May was made merely by the pressure and importunity of the wife,<sup>(a)</sup> and was done clandestinely, at a time when it was at least very doubtful whether the deceased had sense enough to know what he did; and therefore I gave sentence for the first will, dated 28th May, 1751.

(a) If a man make his will in his sickness by the over importunity of his wife, to the end that he may be quiet, this shall be a will made by control, and shall not be a good will. By Roll, C. J., in a trial at bar in the case of one *Hacker and Newborn*, Mich. 1654. The case is entitled *Hacker and Newborn, a Sussex case*.—*Styles*, 427.

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SHAUNESSY against ALLEN, Attorney of MELONY.—p. 9.

Conclusion of a cause rescinded, to allow proof to be produced of the hand-writing of a testator.

JAMES SHAUNESSY, deceased, made his will 24th January, 1745; gave a legacy of 10*l*. and the residue to Brian Melony, and made him executor; deceased's widow opposed it; Allen, attorney to Melony, propounded it, and examined only two witnesses: the widow did not plead.

1. Josiah Mabert.—The testator, the deceased, in this cause, told deponent he wanted to make his will, and gave deponent instructions to the purport of the will; proves reading, approving by deceased, and execution; believes the three other subscribing witnesses were present, but does not perfectly remember it; proves capacity.

2. Charles Hardy, Esq.—Deponent was commander of the ship on board which deceased was; proves the name, "Charles Hardy," to the will subscribed as a witness to be his own hand-writing; does not remember the transaction, but believes the will was signed in his presence by deceased.

The counsel objected that the will was not sufficiently proved, there being only one witness to it; for Captain Hardy speaks only to his belief, and therefore makes no proof.

JUDGMENT.

SIR GEORGE LEE.

I rescinded the conclusion of the cause for the purpose of allowing Allen, the attorney, to plead the subscription to the will to be deceased's hand-writing: he accordingly pleaded, and fully proved it, and I afterwards gave sentence for the will with costs.

## LAUD against BROWNE.—p. 10.

Administration granted to an uncle in preference to a creditor.

*Dr. Paul* for Laud.—Alexander Browne died in the Tartar sloop, in August, 1745; Laud, as a creditor, prays administration to him, and says deceased died without relations. Browne appears, and alleges deceased left an uncle at Rhode Island. Wickham, agent for the sloop, entered a caveat 8th January. Court ordered Mr. Smith, proctor for Wickham, to exhibit a proxy; none exhibited, and he therefore cannot oppose administration being granted to Laud.

*Dr. Simpson*, for Browne.—Deceased died a batchelor intestate, and left Samuel Browne his uncle. Wickham is agent for the Tartar sloop; Laud was the master of the Tartar; Laud has made a general affidavit of being a creditor; Wickham (who, as agent, has an interest to see he pays the prize-money belonging to deceased to a proper person,) ordered a caveat on behalf of the uncle to be entered, and has sworn deceased left an uncle at Rhode Island, and prays it to be granted to him, and a commission to swear him.

Affidavit of William Laud, 14th January 1752.—Knows of no relation deceased had; deponent is a creditor to him; deceased left only prize-money in the hands of Wickham; believes caveat was entered by him; believes Samuel Browne is a feigned name.

Affidavit of Benjamin Wickham, 25th January 1752.—Deceased died in September 1745, a batchelor; left behind him Samuel Browne, an uncle, and other relations; Samuel was alive in February last, and believes he is now alive; has known him twenty years; deponent has paid most of the Tartar's prize money.

## JUDGMENT.

SIR GEORGE LEE.

I decreed administration to the uncle, and a requisition to swear him, returnable the last session of Trinity Term, 1752.

## TROTMAN against TROTMAN and Others.—p. 12.

The legatees to three testamentary schedules cited by the executor under a will to propound all or any of these schedules; schedules pronounced against.

THOMAS TROTMAN, Esq., died 26th May 1751; made his will dated 3d May 1743; left three other papers: No. 4, dated May 1751; No. 5, not dated; No. 6, dated Thursday before Whit-Sunday; deceased out of his senses when the three last papers were wrote. Samuel Trotman, Esq. executor of the will of 1743, cited all the legatees to propound all or any of the three schedules, &c. Mr. Abbot appeared and propounded No. 6, for two legatees, Thomas and Elizabeth Philips, but did not give in any allegation.

## JUDGMENT.

SIR GEORGE LEE.

I pronounced against the three schedules, and decreed probate of the will in common form to the executor.



## SULLIVAN against HAYDON.—p. 12.

Interest denied, but pronounced for.

HAYDON, executor of a seaman, got probate of a will said to be deceased's. Sullivan, brother to deceased, called him to bring in probate, &c. Hayden denied his interest. Sullivan propounded, and fully proved it.

JUDGMENT.

SIR GEORGE LEE.

I gave sentence for his interest, with costs.

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## PRICE against SCOTT, STAMP, and COLE.—p. 12.

Memorandum for a will, written on the back of a letter, established as a will.

BENJAMIN SMITH, attorney at law, wrote a memorandum for his will on the back of a letter, dated 3rd October, 1743; gave the residue to his relations, as appointed in his father's will. James Cole, a residuary legatee in deceased's father's will, propounded this schedule as being a residuary legatee therein. The schedule was fully proved to be deceased's hand-writing. No opposition.

JUDGMENT.

SIR GEORGE LEE.

Sentence for it, as deceased's last will.

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## CAROLUS against LYNCH.—p. 13.

Administration which has been granted to a creditor revoked, on the production of a will.

GARRETT CAROLUS made his will, dated 30th October, 1747, and appointed his daughter, Mary Carolus, executrix and universal legatee; deceased being indebted to Lynch 7l. 13s. 4d., gave him a letter of attorney to receive wages at the India House for payment of his debt. Lynch received from the Company more than his debt amounted to; but, nevertheless, he, pretending to be a creditor, and that there were no relations, obtained administration. The daughter called him to bring in the administration, and to show cause why probate should not be granted to her of the will. Lynch appeared, and opposed the will. Mary Carolus propounded it, and has fully proved the execution, &c. of the will; and that Lynch knew she was deceased's daughter.

JUDGMENT.

SIR GEORGE LEE.

I gave sentence for the will, and revoked the administration, and condemned Lynch in full costs.

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## CORNISH against CORNISH.—p. 14.

Administration which has been granted to an illegitimate son on a false affidavit, revoked.

**THOMAS CORNISH**, of the ship York, died a widower, intestate, on 25th August, 1749. He left John Cornish, a minor, his only lawful child, and Thomas Cornish, his natural son by Elizabeth Bastard, whom he married on 18th August, 1729, and Thomas, the son, was born 28th March, 1729, preceding. After deceased's marriage to Elizabeth Bastard, he had by her John Cornish, the minor. 9th March, 1751, Thomas Cornish, the bastard son, took administration to deceased; swore he was deceased's natural and lawful son. 18th March, 1751, Thomas was cited to bring in the administration, &c., and to show cause why it should not be granted to John Crank, as guardian to the minor son, &c. Thomas Cornish absconded; viis et modis issued 2nd sess. Trin. 1752; Cheslyn appeared for Thomas, and brought in the administration, and confessed John to be deceased's lawful son, but denied him to be the only next of kin to deceased; Major, John's proctor, propounded his interest as deceased's only next of kin, and fully proved it by six witnesses.

JUDGMENT.

SIR GEORGE LEE.

I pronounced for the interest of John Cornish, as deceased's only next of kin, revoked the administration granted to Thomas, and condemned him in 25*l.* costs.

#### TREGAYLE against MENNELL.—p. 14.

A will proved per testes.

**LITTLETON POINT MENNELL**, Esq. made his will, dated 20th September, 1751; appointed his son, Hugh Mennell (who is a minor) sole executor; administration cum test. was granted to Tregayle, as his guardian; Tregayle, as guardian to the minor, cited Godfrey Mennell, deceased's eldest son, to see the will proved by witnesses: Godfrey appeared; the will was propounded, and execution, handwriting, and deceased's capacity, were fully proved.

Sentence for the will.

#### TAYLOR against NEWTON.—p. 15.

Where an administration has been granted to a guardian pendente minore estate of a widow, and the widow, on coming of age, renounces in favour of a creditor, the creditor has a right to call on the original administrator for an inventory and account.

**WILLIAM TAYLOR** died intestate; left a wife who was a minor and one child an infant; in June 1751 administration was granted to Newton as guardian to the widow; in November 1751 the widow came to age, and then she renounced for herself and child and administration was granted to Isaac Taylor, a creditor; Newton refused to account to Isaac Taylor; Taylor called him to give in an inventory and account; Newton appeared under a protestation because his administration was expired, and Dr. Jenner, his counsel, insisted he was not liable to account now his administration is expired.

## JUDGMENT.

SIR GEORGE LEE.

But I decreed Newton to give in an inventory and account by 17th of March, and condemned him in 1*l.* 6*s.* 8*d.* costs.

## TEW against BAINES, aliás FORRESTER.—p. 15.

WILL proved at Totness by Baines; subsequent will proved in Prerogative by Tew; Baines was cited to bring in her will, &c.

## JUDGMENT.

SIR GEORGE LEE.

I revoked the probate granted to Baines and assigned her proctor to bring it in by 17th March following.

## ARCHES COURT OF CANTERBURY.

## WALTON against RIDER. (a).—p. 16.

A suit for jactitation of marriage not sustained. Sentence in favour of the marriage.

DR. HAY for Rider.—This is a cause of jactitation of marriage brought by the Rev. William Walton, Clerk, against Rachel Rider by letters of request from Ely. Jactitation confessed; Rider justified, and pleaded

(a) Suits for jactitation of marriage were of very familiar occurrence in the ecclesiastical courts of this country till the year 1776, when they were brought into disrepute by the celebrated trial of the Duchess of Kingston for bigamy, before the House of Lords. In the year 1768 the Duchess, under her maiden name of Chudleigh, instituted a suit for jactitation of marriage in the Consistory Court of London, against Mr. Hervey, (afterwards Earl of Bristol): he appeared to the citation, and ostensibly defended himself by pleading a marriage to have taken place between Miss Chudleigh and himself on the 4th of August 1744, at Mr. Merrill's house, at Lainston (the marriage, in fact, had taken place in Lainston church), in Hampshire. A counter-plea was given in on the part of Miss Chudleigh, and on the 10th of February 1769, the Judge of the Consistory Court of London (Dr. Bettesworth,) pronounced against the validity of the marriage, and, according to the usual formula of such suits, enjoined Mr. Hervey to perpetual silence on the subject. After this sentence, Miss Chudleigh intermarried with the Duke of Kingston, and on the death of the Duke, the prosecution against her, for bigamy, was instituted in the House of Lords, Mr. Hervey having, in the interval, become Earl of Bristol. In the course of the discussions in the House of Lords, the proceedings in the jactitation cause, and the sentence of the ecclesiastical court were permitted to be produced and read *de bene esse*, and the counsel for the Duchess, Mr. Wallace, (afterwards Attorney-General) Mr. Mansfield, (afterwards C. J. of the Common Pleas) Dr. Calvert, (Dean of the Arches, 1778) and Dr. Wynn, (Dean of the Arches, 1788) contended that the sentence of the ecclesiastical court was conclusive, as long as it remained in force, and that of necessity it must be received in evidence in all courts, and in all places where the subject of that marriage has become a matter of dispute. On the other side it was contended by the attorney (afterwards Lord Thurlow,) and solicitor-general, (afterwards Lord Rosslyn) and by Mr. Dunning, (afterwards Lord Ashburton) and Dr. Harris, that the sentence in the jactitation cause being collusive, was a nullity,—that even if it were fair, it could not be admitted against the king, who was no party to the suit:—that if admitted, it could not conclude a suit of this description, which put both marriages in issue,—that these objections arose from the general nature of the sentence pronounced, which was never final; from the parties who could not, by their act, bind any but themselves, or those who are represented by them, or at most those who might have intervened in the suit; from the nature of the present indictment, which put the marriage directly in issue, and from the circumstances peculiar to the sentence, which proved it to be collusive.

marriage; the parties were intimate in 1724 and 1726; she was then aged about 24 and he about 20; she finding herself with child came to town and told a relation they were contracted; 7th November 1727 they were married at the Fleet by Wagstaffe, a priest of the Church of England; Rider was delivered of a child in January 1727, which by mistake was baptised by name of Watson; she then went down to Ely in 1727 and owned her marriage and was reputed his wife by his and her families; in 1734 he wrote to her to beg she would disclaim the marriage; he did the same in 1742 and 1744; there is a positive proof of a fact of marriage by Blackburn, and in 1728 he declared he was married to her; Walton was indicted twice in 1749 for bigamy; in August 1749 the bill was not found; in March following it was found but nobody prosecuted, and then he commenced the cause of jactitation.

*Dr. Paul, contra, for Walton.*—Marriage 7th November, 1727; child born 11th January, 1727; baptised as the child of William and Rachel Watson; Blackburn the only witness to the marriage; he falsified in his deposition; the pleaded contract no proof of it; but with child long before the pretended marriage; has pleaded Wagstaffe was a priest in holy orders; no proof of it; one witness against the answer of the party makes no proof; they never cohabited together from the time when they are said to be married; he never maintained her or paid any thing for her for twenty-three years; she has lived at Ely at her own expense and has received the rents of her own estate; in 1744 he married another woman publicly and has had children by her; Rider has cohabited with a tailor and appears to be a lewd woman; Walton did offer her an annuity if she would disclaim the marriage in order to satisfy his present wife; he wrote to her by the name of Rider.

*Evidence for Rider.*

1. Thomas Blackburn, Gent. æt. 70; deponent has known Rider about thirty-six years by marrying her aunt, and has known Walton about twenty-five years; Walton was the son of John Walton, victualler, at

After the argument had been brought to a conclusion, the following questions were put to the judges by order of the House:

1. Whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage, is conclusive evidence, so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive, if on such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

The Lord Chief Justice of the Common Pleas (Sir William de Grey, afterwards Lord Walsingham) having conferred with the rest of the judges present, delivered their unanimous opinion upon the said questions, and after stating the reasons of that opinion in considerable detail, concluded thus:

We are, therefore, unanimously of opinion:

First—That a sentence in the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the court from proving the marriage in an indictment for polygamy.

But, secondly—Admitting such sentence to be conclusive on such indictment, the counsel for the crown may be permitted to avoid the effect of such evidence, by proving the same to have been obtained by fraud or collusion.

These questions were put to the judges on one day (19 April, 1776,) and answered on the day following.—See *Trial of the Duchess of Kingston for Bigamy*, Howell's State Trials, vol. xx. pp. 355. 538.

Within my recollection only one suit for jactitation of marriage has been raised in any of the courts at Doctors' Commons. It was instituted by Lord Hawke against a person called Augusta Corri, who had assumed the name and style of Lady Hawke.—See *Hawke v. Corri*, 2 Hag. 290. [4 Eng. Eccl. Reps. 543.]

Ely, and Rider was niece of John Walton's second wife; publicly reported at Ely that they courted each other with consent of parents; he was then a student at Cambridge; the end of October, 1727, Rider came to deponent's house in London, and told him she was with child by Walton; deponent went to Cambridge to persuade him to marry Rider and told him if he would not he must give security to keep the child; he did not deny she was with child by him; 7th Nov. 1727, they were married at a house near the Fleet, by the Rev. James Wagstaffe, *who deponent believes was a priest in holy orders*, in presence of deponent and his wife, who is since deceased, and of a person who officiated as clerk; deponent gave her in marriage to Walton; on the same day Walton desired deponent to let his said wife lodge and board at deponent's house till after she had laid in; deponent and his wife consented; and she did lodge and board at deponent's house. On 11th January, 1727, she was delivered of a son begot by the said Walton as deponent believes; he was baptized by the name of John, in the parish of St. Dunstan, as the child of William and Rachel Walton, but by mistake was called Watson; about two months after she and her child went to father's at Ely and lived with him till his death; in 1728 deponent went to Ely to visit her father, and staid there about five weeks, during which time deponent was almost daily at Walton's father's house and was civilly entertained by him; deponent was frequently in company with Walton's father and mother and Rider's father when said marriage has been talked of, and they mutually declared their satisfaction at said marriage and at her having had a child, but John Walton said he would advise them to keep asunder for some time till his son could get preferment to support a family; their marriage has been publicly talked of by several at Ely in deponent's presence, and deponent then declared he was present at their marriage; they were commonly reputed at Ely to be husband and wife.

4. Int. Respondent made an affidavit upon an action brought against Rider for debt in which he was described as a barber. 5. Int. Rider has lived at Ely twenty-three years and has supported herself. 7. Int. Believes minister lives with a woman as his wife, and that Rider, before said woman married Walton, acquainted her that she was Walton's wife. 8, 9. Int. In or about August, 1749, Rider indicted Walton for polygamy, and respondent was examined as a witness before the grand jury in support of said bill, and the *grand jury found said bill (a), and respondent had a warrant for apprehending Walton, but he got out of Huntingdon, and respondent could not apprehend him*; does not know Walton pleaded to said indictment.

2. Cornelius Guy.—Deponent knows the parties, and knew their parents; believes Rider is a sober, modest, virtuous woman; cannot say whether she is generally so esteemed, but never heard any thing to the contrary; deponent always, from 1728 or 1729, esteemed producent to be Walton's lawful wife, because in one of those years Blackburn was at Ely, and then told deponent that producent was married to Walton, and that he gave her away in marriage to him; deponent has called her Walton, and she is generally reputed to be his wife by the best persons in Ely. Producent's son is now living at Ely, and goes by the name of John Walton; deponent always esteemed him to be William Walton's lawful son by producent.

(a) All the passages of the text which are printed in italics are underscored in the original manuscript.

3. Matthew Eburn.—It was a common report at Ely, about 1727, that Walton was married to producent, and *Walton then told deponent he had been forced to marry her at London, and seemed to be very uneasy about it.* Before Walton's marriage to Miss Wolfe, he wrote to deponent about it, and desired him to go to producent about it, and offer her an annuity of 10*l.* if she would sign the certificate mentioned in his letter, dated 2d February, 1744-5; proves said letter to be Walton's hand-writing; deponent went thereupon to producent, and read said letter to her, and desired her immediate answer, whether she would comply with the terms; she said she would consult with Mr. East, and send deponent an answer; she called on deponent, and refused to comply with said terms, for that she had a certificate of her marriage; deponent has often talked with Walton about his marriage to producent, but Walton always said he looked on himself as a single man, *for that the ceremony at the Fleet between them was not binding, and that he was forced to it, or complied through fear.* Deponent, before Walton's marriage to Wolfe, asked him, if he thought his marriage to producent unlawful, *why he made any overtures to dissolve it; he replied, that "it was to satisfy Miss Wolfe, and to prevent producent's giving them any trouble."*

2. Int. Walton was about 18 in 1727. 4. Int. Producent has maintained herself to this time, and has lived in Ely for 23 years, and Walton has all that time lived there, or in the neighbourhood, except when he was abroad. 5. Int. Knows nothing of Walton's courtship to Wolfe but by said letter, which deponent showed to said Walton's father; Walton was publicly married to Wolfe, *and his father seemed very uneasy at it.* 6. Int. They have ever since lived together with reputation, and have had a son, who is since dead. 7. Int. Respondent has heard that producent, in August, 1749, preferred a bill for polygamy against Walton, and that such bill *was not found.* 8. Int. Heard and believes she preferred a second indictment against him in March, 1749, *which was found,* but in August, 1750, he pleaded not guilty, and he was acquitted and *declared not guilty.* 10. Int. Believes Rider is not a virtuous woman, and never esteemed her so to be, but does not believe she is a common prostitute; believes she has for many years kept company in a lewd manner with divers men, and it is well known in Ely. 12. Int. Producent had two brothers attorneys. 17. Int. Producent came to John Walton's house, and she was turned out by a constable; has often heard John Walton declare his detestation of producent and her infamous character, and called her a whore, and her child a bastard; believes John had a very bad opinion of her. 18. Int. John Walton twice entertained William Walton and his wife Martha Wolfe and child at his house, and behaved affectionately to them, and was fond of his grandson. 19. Int. Believes John Walton was an honest, religious man, and does not think he would have countenanced his son, if he had thought him married to producent. 20. Int. Respondent esteems William Walton to be a just and upright man, and does not believe he would on any condition forswear himself.

4. Mary Scott.—Deponent has known producent 30 years, and Walton 20 years; believed from their behaviour there was a courtship between them; producent a virtuous woman; she and her son lived with her father, the son has always been reputed legitimate, and never heard to the contrary but that producent and Walton were married.

5. John Scott.—Gives producent a good character, and has always esteemed her to be Walton's wife, and she is so reputed.

6. Sarah Whitehand.—Deponent supped at John Walton's with producent and her relations, and he treated her very civilly; gives her a very good character; after she was brought to bed, she and her son lived with her father; the son was reputed legitimate, and her father always owned her to be Walton's wife.

7. Gotobed East.—There was a current report of courtship between the parties in 1726; she was frequently at Walton's father's house; gives producent a very good character; deponent has sold her goods, and gave her credit by name of Walton; deponent has received her rents, and she gave receipts by name of Walton, and for the use of her husband; but for three years last past, the tenant has refused to pay without security to be indemnified against William Walton.

5. Int. Believes Walton was publicly married to his present wife. 6. Int. They have lived together with reputation. 7. Int. Believes bill of indictment against Walton, in August 1749, *was not found*. 8. Int. Has heard Walton was dismissed on second bill for want of prosecution. 9. Int. She always gave respondent receipts by name of Walton. 10. Int. Believes her to be a virtuous woman. 13. Int. Tenant refused to pay rent because of her marriage to Walton. 15. Int. In 1747, James Child brought an action of debt against producent by name of Rachael Walton, and she was carried to Cambridge gaol.

8. Rebecca Johnson.—Gives producent a good character; believes she is accounted to be Walton's wife by the best inhabitants of Ely.

9. Francis Winter.—Producent a virtuous woman, reputed to be Walton's wife; has constantly taken the name of Walton.

10. Oxenden Eburn.—Read to interrogatories only.

4. Int. Producent has maintained herself. 6. Int. Walton and his present wife have lived together with reputation. 17. Int. Has heard Walton's father speak ill of producent. 19. Int. Walton's father an honest man, and would not have countenanced his son if he had believed he had been married to producent. 20. Int. Gives Walton a very good character.

11. Charles Green, Esq.—Producent was, in 1730, admitted to a copyhold tenement by the description of Rachael Walton, formerly Rider, wife of William Walton.

8. Int. In Aug. 1750, Walton put himself upon his trial, and was acquitted for want of prosecution.

12. John King.—Proves producent's good character; says, she was constantly reputed to be Walton's wife; deponent has talked with Walton's father about his son's marriage, and has heard him say his son was ruined, but cannot recollect the particulars of such discourse; producent's son reputed legitimate in January 1746; producent gave deponent note, and she signed it by name of Walton; esteems her the wife of Walton.

13. Mary Cullen.—Deponent is sister to Walton; *has heard he made offers to producent to disown her marriage with him*.

5. Int. Walton publicly married his present wife, and his father declared his liking of such marriage. 6. Int. Walton and his present wife have lived together with reputation, and have had a son, since dead. 10. Int. Does not believe producent is a modest virtuous woman, nor ever esteemed her such, but believes she is a debauched woman, and has

the character in Ely of being a common prostitute: and is reputed to live incontinently with one Petty, a tailor at Ely, and to have so done for two years past; once saw her on a table and a man's hand up her petticoats. 17. Int. Producent was once forced out of respondent's father's house. Respondent has heard her father express great aversion to producent, and call her whore, and her son a bastard, and said she had ruined his son. 18. Int. Walton, and his present wife and son, were well received by his father, and he owned Martha Wolfe as his daughter-in-law, and was very fond of his grandson. 19. Int. Respondent's father was an honest man, and believes he would not have countenanced his son if he had believed him married to producent. 20. Int. Gives Walton a very good character.

14. Sarah Nunn.—Believes producent is a sober virtuous woman, and is so esteemed; has always gone by name of Walton, and is commonly reputed to be his wife.

15. Jane Benton.—Deponent has known producent twenty years; lived four years in the same house with her; gives her a very good character; she is reputed Walton's wife; she and her son lived with her father to his death, and believes he always esteemed her to be Walton's wife; her son is reputed legitimate.

16. William Rider.—Deponent is producent's brother; in 1726 and 1727, William Walton made his addresses to producent in way of marriage, and she received his courtship in a public way, and believes their parents knew thereof; she was often at his father's house; deponent advised producent not to regard what William Walton said, but believes they did contract themselves, and that then she let him lie with her; gives her a very good character; believes she would not have suffered any man to have lain with her if she had not been married or contracted to him. She being with child, went to London to lie in, and afterwards returned to her father, and brought her child, and constantly was reputed to be the wife of Walton; deponent always esteemed her son to be legitimate. In September, 1728, Blackburn came to Ely; producent constantly went by name of Walton, and was admitted to a copyhold by that name, and as wife to William Walton in 1731.

17. William Atkinson.—Gives producent a very good character, she was esteemed the wife of Walton by the principal inhabitants of Ely.

18. John Bomont.—Gives producent character of a very sober, virtuous woman; her father received her as the wife of Walton, and her son as legitimate. *John Walton has acknowledged to deponent that his son was married to producent, and once said he wished they were unmarried, for that they could not agree*; deponent always esteemed her son to be legitimate, and he is reputed so to be.

Exhibits.—B. "21st January, 1727-8, baptised John, son of William and Rachael Watson, born 11th January."

C. dated 22d August, 1734. Letter from Walton to Mrs. Rachael Ryder, at Ely.

M. m. "At a certain time you unjustly brought me under a necessity of undergoing an evil, &c." Letter of threat to make her disclaim the marriage.

D. 16th August, 1742, directed to Rachael Ryder, to the same purpose.

Letter to Eburn, dated 2d February, 1744.

N. B. The letters make strongly for Rider; he did not plead.



*Dr. Hay's* argument for Rider.—Her character fully established; courtship positively proved by William Rider, and other witnesses prove a general report of it; Blackburn, in 1728, declared to Guy that he was present at the marriage, and gave Rider away, which confirms the evidence which he has now given of the fact; she constantly affirmed the marriage; acknowledgments by Walton of his marriage, for by his letters he speaks of the ceremony that passed between them; offered her money to disavow her marriage. In the case of *Leeson and Lord Fitzmaurice* (a), he made her declare in writing that she was not married to him; Delegates held that to be a strong circumstance in favour of the marriage; it is not necessary to prove the clerk that married them was in orders (b). Captain John Campbell, deceased; Jane Campbell pretended to be his wife, and pleaded her marriage to him on 9th Dec. 1725; Margaret, another woman, who pretended to be his wife, and pleaded that she was married to deceased in 1724; Jane insisted that Margaret was barred by not having ever claimed him; commissaries of Edinburgh admitted Margaret to plead her marriage; Jane appealed to the Lords of Sessions; they held she was barred, and reversed the sentence of the commissaries; Margaret appealed to the house of lords, and they affirmed the commissaries' decree on 6th Feb. 1728.

*Dr. Smalbroke*, same side.—If this marriage is not established, the child will be bastardized.

*Dr. Paul*, for Walton.—Thomas Blackburn, single witness to fact of marriage, *Allom v. Jordan*, 1 Vern. 161, (c), but one witness against the answers of the party; held there could be no decree upon that evidence.

N. B. Walton's answers were mentioned by his counsel, but were not read.

In *Leeson and Fitzmaurice's* case, (d) Lord Chancellor Talbot looked into his answers: Delegates case of *Arthur and Arthur*; (e) the question was, whether they were married; a Romish priest swore he married them; Archbishop of Dublin required him to exhibit his orders; he refused, and the Archbishop rejected his testimony; Delegates held he was not obliged to show his orders, but must show he was a reputed clerk. *Franklyn against Kelly*, 1724, upon a review before Lord Chancellor; Kelly married Franklyn in 1710; never cohabited or consummated; in 1720, he married another woman, and had children by her; sentence in Ireland for the first marriage, reversed in Delegates; Franklyn prayed a review; denied by Lord Chancellor; no cohabitation from the time of the marriage in the present case.

*Dr. Bettesworth*, same side.—No step taken by her in twenty-two years to establish this marriage; no courtship, cohabitation, or consum-

(a) *Fitzmaurice alias Leeson contra Fitzmaurice*, Deleg. 4 March, 1732. The Delegates present at the sentence were, the Bishops of Oxford and Bangor, Mr. Baron Comyn, Drs. Tindall, Audley, and Kinaston. This is the case cited by Lord Stowell in the case of *Dalrymple v. Dalrymple*, 2 Hagg. pp. 69, 100. [4 Eng. Eccl. Rep. 492.]

(b) See Lord Stowell's observation as to this point, in *Hauke v. Corri*, 2 Hagg. 288. [4 Eng. Eccl. Rep. 543.]

(c) Entitled in the Report, *Alam v. Jourdan*. The whole Report is comprised in one sentence; viz. There being but one witness against the defendant's answer, the plaintiff could have no decree. 1 Vern. Case, 151.

(d) In the *Dalrymple* cause, Lord Stowell claimed, and exercised his right as a judge, to look into the answers. 2 Hagg. 127. [4 Eng. Eccl. Rep. 518.]

(e) *Arthur v. Arthur*, Deleg., 24th Nov. 1720. Judges Delegates present at the sentence: the Bishops of Worcester and Peterborough, Mr. Justice Dormer, Sir Henry Penrice, LL. D. and Drs. Wood and Andrews.

mation, subsequent to the marriage; clandestine marriage; his character good, and hers strongly attacked. *Cunningham and Cunningham*, one witness unsupported cannot make a full proof of a marriage.

JUDGMENT.

SIR GEORGE LEE.

In this case I pronounced for the marriage of William Walton with Rachel Rider, and condemned him in costs.

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WHITMORE against WHITMORE.—p. 30.

Suit for a divorce, by reason of cruelty.

MABELL WHITMORE brought a suit in the Consistory Court of London, against George Whitmore, her husband, for a divorce for cruelty; she pleaded great variety of facts of cruelty for a long series of years, and examined many witnesses, who made as strong proof as possible. The Chancellor of London, Dr. Simpson, gave sentence for a divorce, and settled an alimony on her of 70*l.* a year. I was originally counsel for the wife. The husband appealed to the Arches, but never pleaded in either court; the cause upon the appeal was heard before Dr. Pinfold, Surrogate to me as Dean of the Arches, who affirmed the sentence of the Chancellor, and Whitmore appealed to the Delegates.<sup>(a)</sup> As for the evidence, see my notes.

(a) *Whitmore v. Whitmore* was appealed to the High Court of Delegates, on 5th June, 1753, but did not proceed to a sentence in that court. It appears from the assignation books, that, on the 15th November, 1753, the proctors for the parties litigant alleged the cause to be agreed.

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PREROGATIVE COURT OF CANTERBURY.

STRETCH, formerly PYNN, v. PYNN.—p. 30.

Creditors have no right to interpose in the grant of an administration between a widow and the next of kin: the practice is to grant administration to a widow, unless some objection exists against her.

*Dr. Paul* for Stretch.—Henry Pynn died intestate in Oct. 1750, at Newfoundland; left a widow and ten children, three by his first wife, and seven children by his second wife. The widow entered a caveat, and prays administration to be granted by her. Augustus Pynn, deceased's eldest son by his first wife, has also entered a caveat, and prays the administration to be granted to him; the son insists the creditors desire it may be granted to him; the widow offers undoubted security; the son has been advanced in the father's lifetime; she has greater interest in the estate than he; no objection to the widow, but that she is married again.

*Dr. Simpson* for the son.—Six children, minors, under the care of the widow. Deceased was a merchant, and the eldest son was employed under his father. Stretch, her present husband, was a clerk in deceased's counting-house, and now carries on trade with deceased's effects: she

possessed the effects without any authority; the estate about 11,000*l*. The son entered caveat against granting the administration to the widow; the creditors swear they believe they shall never recover their debts if administration is granted to the widow; she claims an estate under a settlement which may be a bar to her distribution.

The act of Court read.

Stretch, servant to deceased, at 30*l*. per annum wages; the widow took possession of the effects, without administration; Stretch, her husband, worth nothing; lives at Newfoundland, and will return thither without paying the debts; Augustus Pynn, well acquainted with deceased's affairs, and offers full security; six children, minors, live with their mother Stretch, and one is dead. Widow has not applied any effects, but what she has made herself debtor for; Pynn, the son, has lived seventeen years at Newfoundland, and is settled there; the widow offers undoubted security, and names the persons.

Affidavits for the son.

1. Jacob Thrawle.—Deponent well knew deceased, and his wife and son, and Michael Stretch; deceased died in Oct. 1750, and left a widow and ten children in Newfoundland; widow soon after married Michael Stretch, and took possession of the effects, to amount of 5000*l*., and did exclude the son from the knowledge of the effects; Stretch and his wife have no estate; deceased indebted to persons at Bristol in 2000*l*.; Stretch lives at Newfoundland, and believes he and his wife will go back together as soon as they have got the effects, without paying the debts; son lived with his father, and is well acquainted with deceased's affairs, and is the fittest to have the administration.

2. Augustus Pynn, mariner, the son of the deceased, and party in this cause.—Deceased left estate of 11,000*l*.; deponent well acquainted with his affairs; Stretch and his wife possessed themselves of effects to amount of 5000*l*.; they have no substance; Stretch lives in Newfoundland; believes they will get possession of the effects, and go abroad without paying the debts.

3. David Peloquin, Esq.; 4. Samuel Ball; 5. James Ball.—Peloquin says, deceased was indebted to Mary Bell, to whom deponent is executor in 200*l*. by bond, and there is now due to Ball's estate on that and other accounts, 420*l*. for principal and interest, &c.; believes the creditors will be more secure if administration is granted to the son.—Samuel and James Ball say to the same effect, and believe Stretch and his wife will go abroad; believe the son will duly pay the creditors.

6. Henry Dampier, Esq.—Deceased indebted to deponent in 317*l*. and upwards; believes Stretch and his wife will go abroad without paying the creditors; believes the son will pay.

Affidavits of the rest of the creditors are to the same purpose, and their debts amount to 1052*l*.

Affidavits for the widow.

1. Robert Smith.—Deceased left widow and ten children, one is since dead, but six live with their mother; the youngest not three years old; the son has been resident at Newfoundland for seventeen years past, when he is not at sea; deceased kept Stretch as his book-keeper, his son not being fit for that office; Stretch was entrusted by the deceased with the management of his accounts, and affairs in trade; Stretch capable of business in the Newfoundland trade, and has an honest fair character; his wife continued in possession of the deceased's effects after his death,

there being no court in Newfoundland to grant administration, and she could not apply for it in England sooner; the son has frequently declared he would sink the whole estate to be revenged of his mother-in-law; widow married Stretch about five months after her husband's death, he being acquainted with deceased's affairs. The son has been preferred in deceased's life-time, near equal to the shares of the remaining children, and has several of deceased's effects in his hands; Stretch has often informed the son in the deponent's presence, of the deceased's affairs, and he has himself inspected deceased's effects. The widow has an estate in fee to her own use, of the value of 2000*l.*; Stretch has often told both the son, and Jacob Thrawle that he would justly pay the debts; several large debts are due in Newfoundland, which will be in danger by Stretch's absence; has heard the son swear he would destroy the whole estate, rather than those who are interested should have any benefit; son a drunken man, and is so reputed.

2. Michael Stretch; 3. Ann, his wife.—Michael Stretch says "He lived with the deceased for several years as his clerk and book-keeper, and managed his accounts and wrote his letters of business; son was seldom suffered by the deceased to inspect his books; deceased's personal estate was not more than 6000*l.* clear, for there are about as much more desperate debts."—Ann Stretch says, "Deceased left ten children; six now under her care, the eldest not fourteen, the youngest not three years old; admits she has taken possession of some of the effects, and the son has also taken possessed himself of some; has never applied any of the deceased's effects to her own use, but such as she has made herself debtor for in deceased's books; never refused the son to inspect the deceased's effects, &c., except when he has been drunk; has heard son declare he would destroy the estate, to be revenged of the deponent; deponent married Stretch for protection against the son."—Michael Stretch says, "He has paid upwards of 2000*l.* of deceased's debts, and has often declared he would pay the just debts; son little acquainted with merchant's accounts, and did not know deceased's transactions; son lives at Newfoundland, and has a wife and three children there; was preferred by the deceased equal or nearly to the shares of the other children; son had several of the effects, and has disposed of some of them."—Ann Stretch says, "She has an estate of 2000*l.* to her sole use, exclusive of her distributive share."

*Dr. Simpson*, for the son.—Son preferable as a male; widow has married again; is poor. *Sayer v. Sayer*, Delegates, July, 1713: administration granted to the guardian of a minor son, preferably to the widow. *Blackhall v. Blackhall*, 1720: administration to the son, because the widow has barred herself of distribution. *Shaw v. Houghton*, 1720: the same. *Lewis v. Lewis*, 1724, administration granted from the widow, because she was a bad woman: administration ought to be granted to a man rather than to a woman. 1719, a widower left a son and daughter; and two infants, the daughter guardian to the infants, but the administration was granted to the brother. *Churchman's case*: the son in this case has some effects in his hands, and he has a right to take them, as he is entitled to administration as well as she.

JUDGMENT.

SIR GEORGE LEE.

(a) I was of opinion I could have no consideration of what the credi-

(a) *Ryan v. Ryan*, 2 Phil. 334; *Abbott v. Abbott*, 2 Phill. 578; [1 Eng. Eccl. Reps. 294. 374.]

tors had sworn, or to their consent in this case; for the question being upon the grant of administration between the widow and the next of kin, the creditors had no right to interpose; that it had always been the practice to grant administration to the widow, unless some material objection appeared against her; but in this case, I saw no objection at all against her; she did not appear to me to have misbehaved in any respect: and as there were six minor children, to whom she was the natural guardian, and they lived with her and were under her care, their interests were united to hers, which gave her also a great majority of interests, and therefore, in every light I thought the administration ought to be granted to her; and I accordingly decreed the administration to Mrs. Stretch, the widow of the deceased, she giving undoubted security.

*Webb v. Needham*, 1 Add. 494. [2 Eng. Eccl. Reps. 189.] Under peculiar circumstances administration has been granted to a creditor, in preference to a grandfather. *West and Smith v. Wilby*, 3 Phill. 374. So also to a daughter who had succeeded in setting aside a will, in preference to the widow. *Dew v. Clark and Clark*, 1 Hagg. 311. [3 Eng. Eccl. Reps. 135.]

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## ARCHES COURT OF CANTERBURY.

### PROUT against CRESWELL.—p. 30.

A churchwarden cannot prevent a minister appointed under a sequestration, from officiating in the church.

Augmented curacies stand on the same footing with respect to sequestrations as presentative livings.

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### BUTLER against BUTLER.—p. 38.

(*Appeal from St. Asaph.*)

Surr by the husband against the wife for a divorce for adultery; an allegation of faculties was admitted; but before the husband's answers were given in, or any witnesses examined thereon, the judge, without any proof of the husband's estate, settled an alimony of twenty shillings a week on the wife; the husband appealed therefrom.

*Per Curiam.*

I pronounced for the grievance and retained the cause.

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## PREROGATIVE COURT OF CANTERBURY.

### Dame ELIZABETH COOKES WINFORD, alias HELLIER against HELLIER and BARRINGTON.—p. 30.

An application to compel the widow of a party deceased, to be examined on interrogatories, touching the cancellation of a will, rejected.

*Dr. Hay*, for Hellier, the son.—Deceased Samuel Hellier, Esq. died

22d Nov. 1751, left Lady Winford, his widow, and a son by a former wife, a minor. Widow prays administration to deceased, as being dead intestate. Barrington, guardian to the son, entered caveat, and prayed scripts and scrolls; she gave in affidavit of scripts, &c. Four papers are brought in: No. 2, a will which is cancelled; No. 1, a codicil unexecuted; and No. 3 and 4 imperfect papers. We now pray she may be examined on interrogatories, concerning the cancelling of the will No. 2. In October, 1751, deceased told Mr. Harris that he had made his will, and it was then in his study; gave instructions to Harris for a codicil. Harris drew the codicil, No. 1; deceased approved it, and appointed to execute it on 2d December; Harris delivered it to deceased on 21st November, and it was found unexecuted in deceased's pocket. In the codicil there is a revocation of Lord Ward as executor and trustee for deceased's son; Harris searched in vain for the will two days.

Affidavit of John Harris.—Beginning of October, 1751, deceased gave him instructions to make a codicil to his will, and to get it settled in London; and pointing to his upper study, told deponent he had made his will, which was there; deponent drew the codicil, No. 1, on Thursday, 21st November, 1751; deponent carried the codicil to deceased, and deceased desired deponent to fix a day, as soon as possible, to settle the affair; deponent appointed 2d December, 1751; deceased died on 22d November: codicil found in deceased's pocket unexecuted; deponent searched for deceased's will, with two persons named by Lady Winford; after two days' diligent search without effect, Lady Winford desired deponent to search in the scrutoire in the yellow room; he searched there, and found in a drawer, schedules No. 2, 3, 4; No. 2, was cancelled, and No. 3 and 4, were imperfect papers; from the circumstances, and from discourse with Lady Winford and others, *he does verily believe No. 2. was uncanceled at deceased's death, and has been since cancelled*; in codicil, No. 1, there is a revocation of Lord Ward either as a trustee to deceased's son, or as executor of his will; *whereas in the will No. 2, there is no mention of Lord Ward either as trustee or executor*; said revocation of Lord Ward in the codicil was made by deponent by mistake; for deceased talking of his will, told deponent, that "as there was like to be a dispute between him and Lord Ward, therefore, he would not have Lord Ward to be either executor or trustee to his will," and directed deponent to leave a blank for trustees and executors, and deponent, therefore, thinking from such discourse, that Lord Ward was named in his will as trustee and executor, inserted said revocation in codicil No. 1.—N. B. Lady Winford's affidavit of scripts and scrolls was in common form.

*Dr Hay's argument for Hellier.*—*Coates and Meigh*: Prerog. 1745; *Meigh and Dowce* examined on interrogatories. We pray Lady Winford may be examined on interrogatories touching the cancellation of the will.

*Dr. Jenner for Lady Winford.*—Prerog., *Ladies Hardwick and Williams against Cocks*; Prerog., *Exton and Coe*; a codicil of deceased's hand-writing contained specific legacies, but not executed or signed; Exton the executor burnt it; Coe prayed he might be examined on interrogatories to set forth the full contents, but the Court refused it.

N. B. He had set forth the contents in an affidavit and swore he could not set them forth more fully.

*Per Curiam.*

Nobody having seen this will No. 2, uncanceled after deceased's death, I refused to order Lady Winford to be examined on interrogatories; but as her counsel offered to give a further affidavit of scripts and scrolls, I decreed accordingly.

## ARCHES COURT OF CANTERBURY.

### BAXTAR against BUCKLEY. (a)—p. 42.

A contract of marriage proved. The husband enjoined to solemnise the marriage in church, within sixty days after he should be served with a monition for that purpose.

*Dr. Hay*, for Baxter.—Susanna Baxtar has brought a cause of contract of marriage against Millington Buckley, Esq. by letters of request from St. Asaph. Contract was made on 26th May 1743; they lived in the same house; Buckley with his grandfather, Mr. Young, and she was a servant in the house; he aged seventeen and she about nineteen; he declared he should never be happy if she married any body else; he proposed a secret contract at a place called the Weeg, in the parish of Kerry, in Montgomeryshire; he desired Nathaniel Williams to contract; then Williams read the form of the Common Prayer and each party solemnly pronounced the contracting words; this proved by two witnesses who were present; Buckley pleads he was drunk at that time; but we have proved he afterwards twice declared he was married to her; we insist the drunkenness was subsequent.

*Dr. Simpson*, contra, for Buckley.—His estate an 100*l.* a year under the guardianship of his grandfather, and a ward of chancery; she a pert girl, had many sweethearts; Williams is an Innkeeper; did not tell Buckley's grandfather; says the ceremony was performed at her father's house; admit her sister confirms Williams's evidence; no previous courtship; he was very drunk the day before and lay a-bed till twelve of the clock on 26th May when Williams came to see him, and they drank together for two hours; went out with Williams drunk; returned home drunk; and so was drunk before, at, and after the contract; Williams declared he was drunk when he read the ceremony to them; at Poole, in 1747, she did not know Buckley; she constantly declared she was not married to him, and he declared the same; no claim for five years; this suit began in 1748.

Evidence for Baxter.

1. Nathaniel Williams, Innkeeper.—In May 1743 Buckley was aged fifteen and Baxter seventeen; both lived at his grandfather's, Mr. Young, and she was a servant there; Buckley declared great love for her and said he would marry her; in May 1743 he came to deponent and ac-

(a) In the year following the decision in this cause, this description of suit, than which none had been more fruitful in litigation, or had more abundantly exhausted the learning of civilians and canonists, was swept away, together with many of the most ancient provisions of our marriage law, by Lord Hardwicke's marriage act, (26 Geo. 2. c. 33.) See Blackstone's Com. book 1, c. 15; and Hansard's Parliamentary History, vol. 15, p. 1; Hansard's Parliamentary Debates, (New Series,) vol. 6, p. 1325.

quainted him with his love for her and said he had prevailed on her to marry him, but he would not marry her publicly for fear of disobeying his grandfather, and that they had agreed to be privately married; earnestly desired deponent to marry them; deponent several times refused, and dissuaded him therefrom, but he persisted; Buckley told deponent his whole happiness depended on marrying her; in the morning of the 26th May, 1743, to best of deponent's remembrance, Buckley came to deponent and told him he and Baxtar had agreed to meet together at her father's house in order to be married, and then earnestly desired deponent would be there to marry them; deponent again advised against it, but Buckley insisted on it; deponent promised to go after him that evening. On 26th May, 1743, at five in the evening, deponent and Buckley and Baxtar being met at her father's house, and in presence of Mary Harper her sister, deponent took a Common Prayer book and audibly read in a grave manner the whole form of matrimony, and they having then a mind to contract or marry, made their responses thereto in a grave and serious manner, he taking her by the right hand audibly and distinctly in the very words therein prescribed said, "I Millington take thee Susanna," &c., using the very words of the Common Prayer; and then she taking him by the right hand in like grave manner repeated her response, and then he, taking her hand, put a ring on one of her fingers, but does not remember which hand or finger, and said, "With this ring, I thee wed," &c.; deponent joined their right hands together, &c.; then deponent gravely and devoutly concluded the whole in the words of the Common Prayer, and pronounced them to be lawful husband and wife, and they then owned each other as such, and were reputed so by deponent; they continued to live for some time at Young's house, and there owned themselves to deponent to be husband and wife; about a fortnight or three weeks after he expressed to deponent great satisfaction in his choice, and told deponent she did not seem so well pleased as he could wish, and he would endeavour to get a license to marry her as soon as he could. Some time after said marriage deponent was informed Buckley was sent away.

2 Int. She is reported to have been a servant in London. 3 Int. He showed affection to her. 4 Int. On 26th May respondent went to Young's house and inquired for Buckley and desired him to go into the fields with him after partridges. 5 Int. They went from Young's to her father's house and drank there together.

2. Mary Harper.—Deponent is sister to Baxtar; heard Buckley say, he would be married to Baxtar as soon as he could, but he was then much intoxicated with liquor. In May, 1743, Baxtar brought a letter to her father which she said was sent to him by Buckley, and deponent heard her father read out of it, that Buckley desired his consent to marry his daughter Susan, but cannot say, whether it was wrote by Buckley; the father wrote an answer to Buckley in three or four days, which he read to deponent, in which he said he could not give Susan a suitable fortune, but he would do what was in his power for them, which letter deponent delivered to Buckley, and he put it in his pocket; in the afternoon of some day in May, 1743, deponent was present at the house of John Baxtar with Williams, said John Baxtar, and the two parties in this cause, and saw Williams take a Common Prayer book, and heard him distinctly read over the whole form of matrimony to them; and



they having then a mind to contract or marry, made their responses thereto in a grave and serious manner. Deposés they contracted, and did every thing according to the words and form of the Common Prayer; deposés the same as Williams exactly, word for word.

N. B. They both deposé exactly in the words of the libel, except as to the hand on which the ring was put; the libel says on the fourth finger of the left hand, and they do not remember which hand or finger; says they lived in the same house upwards of a month after, and deponent heard him afterwards own Susan to be his wife, and expressed great satisfaction in his choice, and said he would as soon as he could tak license to marry her in the church.

3. Mary Baxtar, widow.—Deponent's mother to Susanna Baxtar; Buckley showed great love to Susanna. In May 1743, he was about seventeen years old, and she was about twenty.

4. Edward Jones.—In June, 1743, Buckley asked deponent if he had seen any body about the house that night to ask for Susan, deponent said, "No." Buckley replied, "I think it is all over with them now;" deponent asked him if he was married to her; he replied he was.

5. John Oliver.—Deponent was servant to Prosser, who lived in the house with young Buckley; declared often to deponent that he had great love for Baxtar, and made his addresses to her; he often inquired of deponent, whether she entertained any sweethearts in his absence, deponent told him he did not know she did; he then expressed great love for her, and said when he was married to her he would present deponent with a pair of gloves; 13th June, 1743, Buckley gave him accordingly a shilling to buy gloves on account of his marriage to Baxtar.

#### Evidence for Buckley.

1. John Prosser.—Deponent was tenant to Young, and lived in the same house with him, the parties in this cause lived also in the same house with Young. Buckley has 100*l.* a year; the latter end of May, and believes 26th of May, 1743, Nathaniel Williams came about noon, and inquired if Buckley was at home, deponent said, "Yes;" Williams went in and staid about two hours, and then they both went out with guns. The night before, *and when they went out on said day, and also when he came home that evening, Buckley was so far drunk as to be disordered in his understanding, and especially when he came home at night;* deponent never heard Buckley own her as his wife; never heard her esteemed such, and does not know they consummated, but believes the contrary. Buckley and Young lay in the same bed together, and Miss Buckley lay with Baxtar. In June, 1743, Buckley denied his marriage in deponent's presence, and bid Baxtar begone from the house; *she also swore by God to Young, that she was not married to Buckley.* Same evening she left Young's service and went to her father's, and about a month after went to London.

2. Mary Prosser.—Never heard Buckley express affection for Baxter to best of her remembrance. On 26th May 1743, Williams about noon came and inquired for Buckley, who she believes was asleep, occasioned by his being very drunk the night before; Buckley came down *and he and Williams drank together for two hours or more,* and then he went out with Williams with a gun, *in appearance concerned in liquor,* and they came home together in the evening *both in liquor, very much.* Never heard him own her for his wife; does not believe they consummated or were reputed to be married. In June 1743, he denied he was

married; she was then turned away, *but declared to Young with an oath, that she was not married.* Baxter went to her father's, and about a month after went to London.

3. Margaret Pugh.—In the afternoon of 26th May, 1743, about six in the evening, says Buckley came to the Delvar alehouse, and fired off a gun in the kitchen where there were many people.

N. B. Her Counsel say this was after he came from Baxter's house where the contract was made; but quære?

4. Mary Buckley.—Never heard the parties intended to marry; Williams came to Buckley, about eleven at noon, on 26th May, 1743, and he returned home about seven in the evening very drunk; never heard they were reputed husband and wife, or consummated; deponent and Baxter lay together, and Buckley lay with Young.

5. Mary Jones, wife of John Jones.—Never heard Buckley express affection for Baxter, &c.; on 25th or 26th May, Williams and Buckley *came home together and he was very drunk*; never heard him own her as his wife same as the other witnesses; heard Young ask Baxter whether she was married; *she swore by God she was not*; she went to her father's and staid a month, and then went to London; never heard she claimed a contract.

6. Jane Gwynne.—In June 1743, deponent received a letter from Young, in which he told her Buckley denied marriage; deponent went to Young's house, where Buckley also lately denied marriage to deponent; but *confessed he and Williams were at Baxter's house and saw Susan there*; said Williams carried him thither under pretence he was thirsty; in November 1749, Williams came to deponent's house and inquired for Buckley, and Williams said to deponent *that he could not, and would not swear anything to hurt Mr. Buckley by reason they were both in liquor, and it was so long he could not remember*; soon after deponent was present, when Buckley refused to see Susan, and he went to London about end of June, 1743.

7. Edward Jones.—In summer, 1747, at Poole, Baxter came to deponent's house, and Davis, who lodged in deponent's house, seeing Buckley in the street called him in, and got him into the room to Susan Baxter, where he did not stay above a quarter of an hour.

8. Mary Jones.—Davis seeing Buckley in the street at Poole, in summer, 1747, called him into deponent's house, and carried him up stairs, and left him with Baxter, where he staid about a quarter of an hour; said Baxter was then handsomely dressed.

9. John Griffith, on another allegation.—In June, 1750, notice was given by the proctors that no witness should go up stairs while any other witness was examining; Mary Baxter nevertheless came up and stood at the door while Williams was examining, and might hear what he said.

10. William Morgan—the same.

*Dr. Hay*, for Baxter.—Contracted after a year's courtship; a question only of fact; both capable of contracting; proof of courtship not necessary; Prosser and his wife and Oliver prove they lived in the same house together; two positive witnesses to the contract, shall show the contract was before he came to the Delvar alehouse, for the contract was about five o'clock in the afternoon; and he did not come to the Delvar alehouse till after six o'clock; Buckley made several recognitions of the contract; she denied her marriage to Young, because it was to be a secret

to him; she came to Poole in 1747, the time when he came to age, and she there sent for him, and did speak with him; her character is not impeached, and want of fortune is no objection; Buckley's declarations that he was drunk are not evidence; general opinion he was contracted; Mary Harper fully swears to the contract, and she is unimpeached; one witness is sufficient, if she is supported by circumstances.

*Dr. Smalbroke*, same side.—At the time of the contract, Baxtar went for barm, and Buckley for drink; they both might have been supplied much nearer at the Delvar ale-house; Buckley was not drunk before six in the evening; it is not proved he come drunk to the Delvar ale-house.

*Dr. Simpson*, contra for Buckley.—Contract between minors of very unequal condition; contracts unfavourable, and especially between minors, and therefore Court will expect the fullest evidence; no claim till 1748, which was two years after he came of age; witnesses not examined till seven years after the contract; to prove a verbal contract, no positive evidence of courtship; no evidence that he ever declared to her that he intended to marry her; must prove an animus contrahendi; not proved that Williams read the ceremony at the request of Buckley, though it was so pleaded; we pleaded drunkenness; they have not pleaded the contrary, or interrogated our witnesses concerning it; declarations to Jones and Oliver were made to keep off sweethearts.

*Dr. Jenner*, same side.—Circumstances precedent are material to be considered; an honourable courtship is necessary to be proved. In the case of *Jones and Gernon*, and of *Ward and Ashby*, written evidence from letters produced to prove courtship; the mutuality of the contract on her part does not appear; she disclaimed in *recenti facto*.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion the contract was fully proved, and that his being drunk at that time was not proved; and therefore I gave sentence for this contract, and enjoined Mr. Buckley to solemnize marriage in the church with Susanna Baxtar within sixty days after he shall be served with a monition for that purpose.

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### HENDREN alias SHAW, against SHAW.—p. 51.

An administratrix with the will annexed called upon for a more full inventory, and then held to have fully administered.

JOHN SHAW, deceased, made his will 30th Dec. 1739; gave legacy of 50*l.* to Ann his brother's daughter; appointed Sarah Shaw his wife, and John How, executors; Sarah proved the will in Easter Term, 1751; citation returned against her to answer to Ann Hendren, formerly Shaw, in a cause of subtraction of legacy; libel given; negative issue; executrix alleged plene administravit; she was assigned to specify 2d Sess. Trin. 1751; inventory and account exhibited, alleged all and singular, &c. to be true, and brought in vouchers; total of inventory 438*l.*, account 199*l.* 4*s.* 10*d.* exclusive of this item, to wit, that before exhibitant's marriage with deceased, a messuage of her's in Arundel Street, was settled on her to her use, in the names of trustees, with all the furniture

that should be there at deceased's death. In the account she craved allowance of said house and furniture of 50*l.* a year for her life, and other sums, particularly 400*l.* covenanted to be at her disposal, and therefore insisted she not only had fully administered, but was a creditor to deceased; 1 Sess. Hill. 1752, Mrs. Hendren gave in answers, objected to as not full; Court assigned her to give in fuller answers; 1 Sess. Easter Term, 1752, Cheslyn, her proctor, exhibited a special proxy under hand and seal of said Ann Hendren and her husband, and confessed the inventory and account to be true.

*Per Curiam.*

I pronounced that Mrs. Shaw had fully administered, and dismissed her.

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## ARCHES COURT OF CANTERBURY.

LILLY v. HARDY.—p. 52.

Parishioners have no rule to guide them in making rates, but common estimation as to the value of property; mere inequalities in the taxation are not sufficient to set aside a rate.

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WESCOMBE against DODS.—p. 59.

*Appeal from the Consistory of London.*

In a suit for jactitation of marriage, the woman admitted to her suppletory oath; the marriage which had taken place in Scotland established.

WILLIAM WESCOMBE instituted a cause of jactitation of marriage against Rebecca Dods, in the Consistory of London, 29th April, 1748. He gave in a common libel of jactitation, 13th May, 1748. Mr. *Cæsar* appeared for Dods, who was then admitted a pauper, and confessed the jactitation, and asserted he gave an allegation pleading a marriage between Wescombe and Dods, 22d June, 1748. The allegation was admitted, pleading that they were married on 26th March, 1741, in the house of James Dow Gardiner, at Castle Barnes, near Edinburgh, in presence of ——— Dow, spinster, Mary King, and others, by David Patterson of the Scottish Kirk, and consummated that day, and at other times at the house of George Blyth, gardener, at Corstorphine, near Edinburgh, and owned each other as man and wife; that on 30th December, 1741, she was delivered of a female child, lawfully begotten by her said husband, which was baptised as their lawful child on 12th January, 1741; that in April, 1741, he came to England, and left her in Scotland, and he has ever since resided in England; that two or three days before he left Scotland, he wrote her a letter, in which he subscribed himself her "loving husband;" 23d June, 1749, he gave in an allegation, pleading that David Patterson is a person of an infamous life; that he is not a minister of any church in Scotland, or in orders, to entitle him to marry any persons, and is deprived of his license to preach, and is excommunicated; and about the time he was examined a witness

for Dods in this cause, he was a candidate for the office of common hangman of Edinburgh, and that he objected against him at the time of his being examined; Wescombe lived about two years in Scotland, but quitted his house there about the end of April, 1741, and has ever since resided in England. Exhibited an extract of the presbytery of Edinburgh, by which David Patterson was deprived of his license and was excommunicated.

N. B. The extract is dated 29th December, 1742, by which it appears he was deprived of his license to preach in 1737, for fornication; in January, 1738, he was declared contumacious, for not appearing before the presbytery, and laid under the censure of the lesser excommunication; was afterwards, in 1741, cited and admonished from the pulpit to undergo censure for clandestine marriages; and on 29th December, 1742, the presbytery passed the sentence of the great excommunication upon him.

27th February, 1749, Dods gave in a second allegation, pleading that in 1742 she commenced a suit in the Commissary's Court at Edinburgh against Wescombe, to prove her marriage; that he was a party thereto, and appeared by his attorney, John Watson, and denied the marriage; she gave in a plea to prove it, and examined several witnesses; and he gave an allegation in such cause to contradict her plea; that the Commissary's Court, on 3rd January, 1745, did pronounce that said William Wescombe and Rebecca Dods were lawful man and wife, and allowed him to 26th June, 1745, to show cause why such sentence should not be put in execution; that after said proceedings, Wescombe did prefer a bill of advocacy against her before the Lords of Session of Scotland, alleging, that at the time she promoted the cause against him in the Commissary's Court, he was resident in England; that the suit against him was a personal action, and must be determined by the Spiritual Court where he resided at the commencement of the cause, and therefore, he was not subject to the Commissary's Court, and prayed their lordships to stop their proceedings therein; to which bill Dods put in her answer, and on 20th June, 1745, the cause was heard before Lord Minto, one of the Lords of Session, who having been informed by the Lord Ordinary as to the jurisdiction of the Commissary's Court, and considered the bill and answer, with the proof, did by his interlocutory decree dismiss said bill. Exhibits a copy of said interlocutory.

N. B. Wescombe's proctor made the same objection to the jurisdiction in the Commissary's Court, but it was overruled.

That on 26th June, 1745, Wescombe again appeared by his attorney in the Commissary's Court, and not showing sufficient cause why the sentence of 3d January, 1745, should not be put in execution, the Commissaries did decree him to adhere to Rebecca Dods his wife, her society, fellowship, and company, and to treat, cherish, and entertain her at bed, board, and other conjugal duties, as became a husband, to do and perform to his lawful wife, and that during the whole time of their conjunct lives together; and exhibited a true copy of the proceedings in said cause in the Commissary's Court; pleads that Patterson has a good character; is a minister of the Kirk of Scotland; was not excommunicated in 1741, and was admitted a witness in the Commissary's Court, though he was objected to by Wescombe.

N. B. It appears by the proceedings in the Commissary's Court, that

Dods examined most of the same witnesses there; that she was examined by commission to Scotland in this cause.

N. B. This day this last allegation was admitted in the Consistory: Wescombe's proctor, for fear of suspension, confessed the copy of the proceedings in Commissary's Court, and the interlocutory decree of the Lord Minto, dismissing Wescombe's bill of advocation to the Lords of Session. Wescombe did not produce witnesses in Scotland. 22d June, 1750, Wescombe gave in another allegation, pleading that in the copy of proceedings in the Commissary's Court, it appears that, in the libel given in there, Dods did allege that the marriage was performed by David Patterson in the house of James Dow, at Castle Barnes, in the presence of Robert Dow and — Dow, son and daughter of said James Dow, and that David Patterson, on his examination on said libel, deposed, that he did marry the parties, and that there were present a young man and a young woman, who were said to be the son and daughter of said James Dow, gardiner, the landlord of the house; and also, that Jane M'Nair, another witness on said libel, deposed, on 31st January, 1744, that Robert Dow, eldest son of said James Dow, left Scotland in the beginning of April, 1741, and went to London; that about the end of March, 1741, Wescombe, Dods, and Patterson, came to James Dow's house, and took said Robert Dow into a room with them; and deponent thought that Elizabeth, said James's daughter, went into the room with them, but cannot be positive; alleges that said David Patterson and Jane M'Nair, examined in said cause in the Commissary's Court, and David Patterson and Jane M'Nair examined in this cause, are the same persons; and that no faith is to be given to the deposition of Jane M'Nair, for that Robert Dow and Elizabeth Dow, the son and daughter of James Dow, or either of them, was not present at any marriage between the parties on 26th March, 1741, at the house of their father James Dow, or at any other time or place; and that Robert Dow left Scotland in January, 1740, and resided at Kingston in Surrey on 26th March, 1741.

N. B. Before the cause was concluded, Dods prayed to be admitted to her suppletory oath.

Witnesses for Dods, examined in Scotland, by requisition:

1. Lady Dunbar.—Deponent knew Dods several years before she was reputed to be married to Wescombe, and since that time she has been frequently entertained in deponent's house; she had always a good and virtuous character, and behaved herself modestly, after it was publicly talked that she was married to Wescombe, and was reputed to be his wife; and while she was with child deponent entertained her for some months in her family, where she was always called Mrs. Wescombe.

2. Barbara Oliphant.—Knew Dods several years before she was said to be married; knows that she resided some time in Lady Dunbar's house both before and after she was publicly reputed to be married to Wescombe; and she had always a good and virtuous character.

3. David Patterson.—About the end of March, 1741, as far as he can remember, deponent did celebrate a marriage betwixt William Wescombe and Rebecca Dods, the parties, who took upon themselves the ordinary vows, which deponent administered to them, and declared them married persons; this happened in the house of James Dow, gardener, in Castle Barnes; *there were witnesses present at said marriage, but deponent cannot, at present, recollect who they were; has heard that,*

after the marriage, they went to Corstorphine together, where they lodged in the house of George Blyth, and entertained each other as man and wife.

Int. Deponent acknowledges he is, and has been, a prisoner for five months, by a warrant granted by Mr. John Balfour, one of the Justices of the Peace of the County of Edinburgh, upon an information, as if he had been guilty of celebrating marriages irregularly, and acknowledges that he was suspended from his office as a preacher of the gospel before said marriage, and that he was afterwards, and posterior to the marriage, excommunicated by the church for contumacy, in not compearing before them; that he was licensed to preach and lecture, and was admitted lecturer in the Trone church of Edinburgh, but that he never was admitted minister to any particular parish.

4. Mary King.—Some years ago deponent was servant to Mrs. Sinclair, in-dweller at Castle Barnes, which is near to the house of James Dow, gardener; deponent kept Mrs. Sinclair's child, and being with the child in Dow's garden she was desired to come into a room in the house; deponent then saw defendant Dods married to a gentleman who was called Mr. Wescombe; Mr. David Patterson officiated as minister and administered the marriage vows to said parties which they took and the minister thereupon declared them married persons. *So far as she remembers there were none present but the parties, the minister, deponent, and a man whose name she knows not*, this was in March about seven years ago but cannot be positive as to the year, only thinks it was about seven years ago; has seen Dods several times since and knows her, but does not remember she ever saw Wescombe before or since.

5. Jane McNair.—Deponent knew James Dow, gardener, near Castle Barnes; deponent was a servant in his family, from Martinmas 1740, to Whitsuntide, 1741; during that time in one afternoon, Rebecca Dods, who deponent now sees in Court, and one Mr. Wescombe, who deponent had frequently seen before, as he lived in Fountain Bridge, and who had often frequented Dow's house, and with them one Mr. Patterson a minister of the Gospel, who deponent had occasion to see frequently before that time, and knew to be the son of Mr. Patterson, who was one of the ministers of the Gospel of St. Cuthbert's in the West Kirk, went into a room in Dow's house by themselves; after they had sat some time in the room they called for drink, which deponent carried into the room to them; a short time after, two men and a woman came to Dow's house, and asked if two men and a woman were there, deponent answered, "Yes," and showed them into a room where the company was. Soon after pen and ink were called for, which deponent carried into the room to them and shut the door. In a little time after they parted, and Wescombe and Dods went to the westward upon the Corstorphine road, and Patterson went eastward towards Edinburgh. (Vide the evidence which this witness gave in the Commissary's Court, which differs in several particulars from this.)

6. George Blyth.—About the end of March, 1741, Wescombe and Dods came together to deponent's house, in Corstorphine, about four in the afternoon; after some stay he called for deponent's wife, and asked her if he could have a bed there that night; she answered that they might have two beds; but said parties both agreeing that they were married together, and were man and wife, Mrs. Blyth made up one bed, where they lay that night together; before they supped deponent went

up stairs to them, and asked Wescombe concerning Dods, who was sitting in the room, "Is this your lady?" he answered "Yes," whereupon deponent drank to them and wished them joy, and she made a bow. A few days afterwards they came back to deponent's house, where they lodged a night in the same manner as before.

7. Lucretia Constable.—About the end of March, 1741, Wescombe and Dods came to deponent's house in Corstorphine, in the afternoon, and after some stay he called for deponent and bespoke supper, and said that he and Dods were to stay all night, and asked if they could get a bed; deponent said, if the woman was to stay there they behoved to have two beds; he answered, that she was his wife and one bed would serve them; deponent said, "You are constantly joking," he answered and swore that defendant was truly his wife, and he wondered deponent had not heard of his marriage before that time; deponent said, "Mr. Wescombe, I thought you would have married one of your own countrywomen;" but he said, he loved defendant better than any of his countrywomen. Wescombe called for deponent's husband and owned Dods for his wife before him; they supped and breakfasted together; a few days afterwards they came again to deponent's house, where they supped, and lay in bed all night, and breakfasted next morning.

8. John Vicarage.—Deponent heard from George Blyth and his wife, that Wescombe and Dods came twice to their house, and lodged each time there all night, and then they entertained each other as man and wife; proves Wescombe's letter to Dods, in which he subscribes himself her most loving husband, to be Wescombe's hand-writing. Dods had been employed in deponent's family as a sempstress, for about twelve month's before she was married; she had a good character and behaved herself virtuously. Wescombe became acquainted with her in deponent's family where he frequently was while she was there. It is most frequent in Scotland for a woman after her marriage to retain her maiden name instead of using her husband's.

9. Elizabeth Vicarage.—In June 1741, deponent heard that Wescombe and Dods had been married some time before, and that he was gone to London, and left orders for her to follow him; deponent looked upon them as married persons, because she heard it so reported, and particularly by George Blyth and his wife, who said they had stayed two different nights at their house, and cohabited as man and wife. In January 1742, Dods was delivered of a child, which was baptised by Mr. Kerr, at desire of deponent's husband; deponent and her husband were present thereat. Dods was employed by deponent as a sempstress in her family for some time before her marriage, she always bore a good character and behaved decently. Wescombe was often in deponent's house, where he saw and conversed with Dods, but deponent never heard him acknowledge his marriage, never having seen him since his marriage was publicly talked of.

10. George Kerr, clerk.—About six years ago, Mr. Vicarage came to deponent, and told him, that Mr. Wescombe had been married some time to Dods, and that she was delivered of a child, which he desired deponent to come and baptise; deponent accordingly baptised the child, and looked upon Mr. Wescombe and Dods as married persons, or else he would not have baptised the child, especially as Dods was not a member of deponent's congregation.

11. Mary Montgomerie.—In June 1741, Dods came to deponent's



house and staid some days with her, and told deponent she was married to Wescombe, and that she had been at London with him; while she staid at deponent's house that time, deponent heard from several, and particularly from the wife of James Smith, writer in Edinburgh, that said Dods and Wescombe were married together; any people that called for Dods at deponent's house, inquired for her by the name of Mrs. Wescombe; she was delivered of a daughter in deponent's house in January 1742; the child was baptised by Mr. George Kerr, of the English chapel; Mr. Vicarage, of the Exchequer, and his wife, were present at the baptism; Dods was visited by several people of character, particularly by one Mrs. Horsburgh, and by Miss Peggy Oliphant, and they treated her as the wife of Mr. Wescombe; and deponent looked upon her as such.

12. Clement Porter.—Deponent knows Wescombe and Dods; has had frequent occasion to see Wescombe's hand-writing; says that the letter exhibited, directed to Miss Becky Dods is, in deponent's judgment, the hand-writing of Wescombe; deponent for several years past looked on Wescombe and Dods as married persons, as did the whole neighbourhood about Fountain Bridge, near Edinburgh.

Read Wescombe's letter to Dods, wherein he styles himself her "loving husband."

"P. S. I beg you will make yourself easy till you hear my excuse for my behaviour."

Witnesses on Wescombe's first allegation.

1. Alexander Johnston, musician, examined 8th Dec. 1749.—Deponent came to know Patterson about twelve years ago, by seeing a great mob one evening about said time, as he was passing by a reputed bawdy-house in the High-street of Edinburgh; upon asking what was the matter, deponent was told that Patterson had been there marrying a young couple, and that the mother of the woman had raised the said mob for his so doing; and soon after deponent saw said Patterson come out of the house, which was the first time deponent ever saw him, but had before heard his character, which was a very bad one; about two years after said time, said Patterson was confined in the Tolbooth, a prison at Edinburgh, for marrying people irregularly, without banns or license, and without having a proper authority so to do, he being a minister of no kirk, or in holy orders, and for keeping lewd women company; and has heard he was excommunicated for said practices by the kirk of Scotland, before deponent knew him; about eleven or twelve months ago, said Patterson then being an excommunicate person, and a prisoner in the Tolbooth, and under sentence of banishment, and the common hangman's place being then vacant, deponent saw Patterson among some other prisoners coming from the court-house of Edinburgh, guarded by soldiers; on deponent's asking the serjeant of the guard what they were going to do with Patterson, he said that Patterson had been offering himself to be common hangman, but was refused, and was going back to prison; Patterson was in the Tolbooth in March last, and believes he was never in holy orders, or a minister of any church; Wescombe lived near Edinburgh about three years, and left it about nine or ten years ago; Robert Mackintosh is clerk to the presbytery of Scotland, and the proper officer to sign the extracts from the presbytery records; does not know his hand-writing; proves the hand-writing of John Watson, notary public, to Ex-

hibit A.—N. B. Exhibit A is the sentence of excommunication against Patterson.

2. Lowry Bonner, ex. December 1749.—Deponent kept a public house in Edinburgh for six years before he came to England, which was about a year and a half ago; during all the time deponent kept said house he very well knew David Patterson; has often seen him perform the ceremony of marriage between several couple, at least ten in deponent's house, and always performed them by night; has heard he was excommunicated for his said irregularities long before deponent knew him, which made him afraid to come out in the day lest he should be taken and put in prison; he was not a minister of any church or in holy orders at the time deponent knew him, but has heard he used to read lectures as a student in Trone church in Edinburgh, but never has done so since deponent knew him; said Patterson had so bad a character in Edinburgh all the time deponent knew him, that deponent would not take his word on any account, and believes he would not scruple taking a false oath if he could gain anything thereby.

3. Andrew Johnston, servant.—Gives Patterson, whom he knew for eight years before October 1748, a very bad character; says he used to marry people irregularly, and was in prison; while he was in prison Margaret Dayless and Margaret Primrose, two women of bad characters, came to Patterson and desired him to give them certificates of their being married to two men, but their names deponent cannot now recollect; Patterson in deponent's presence wrote two certificates according to said women's desire, for which they paid him two shillings, and then he confessed that he had never seen them to his knowledge before that time; deponent never heard that Patterson was in holy orders, but has heard he was, before deponent knew him, morning preacher at the Trone church; when deponent came to England Patterson was in prison.

Robert Mackintosh is clerk of the Presbytery in Edinburgh, it is his office to sign extracts from the presbytery records.

4. William Cauty, cabinet maker.—Proves that Dods in August 1747 followed one William Thompson into deponent's shop and called him Wescombe, and said he was her husband, and insisted that he was so, but on said Thompson and deponent assuring her his name was Thompson, she lifted up his hat which was then flapped over his face and then confessed that she was mistaken, asked his pardon, but said he was very like her husband in the face; deponent has several times since seen said William Wescombe, and says there is a particular likeness in the face of the said William Wescombe to William Thompson.

6. Int. Thinks it possible to mistake Wescombe for Thompson, or vice versa.

6. Robert Biggar.—Knows nothing of Patterson of his own knowledge, but hath heard that about nine or ten years since he was a lecturer in the Trone Church, and not a licensed minister, and therefore incapable of performing the office of matrimony, and that he was a person of a profligate life and conversation, and was turned out of his employment of lecturing for getting a young woman with child, and was afterwards as deponent has been informed, confined a prisoner in the city gaol at Edinburgh for marrying people irregularly.

Read exhibit A., which was the sentence of the greater excommunication of Patterson, dated 29th December, 1742.

Witnesses on Dod's second allegation.

1. Alexander Ross, Gent. ex. 19th March, 1749.—Proves the exhibited copy of the proceedings in Commissary's Court of Edinburgh to be a true copy, sealed with the seal of that Court, and attested by the proper officer.

2. David Bruce, Gent.—Proves the proceedings in the Commissary's Court to be signed by the proper officer; proves Wescombe's bill of advocacy to the Lords of Session.

3. Henry Wardlaw, Gent.—The same as Bruce.

Read for Dods the proceedings in Scotland and the evidence there.

1. David Patterson.—Swears he married the parties; there was present a young man and woman who were said to be the son and daughter of James Dow.

N. B. In the Scotch proceedings Patterson is styled Minister of the Gospel.

2. George Blyth.—Deposes the same as on his examination in this cause.

3. John Vicarage.—Proves Wescombe's letter to Dods in which he signs "loving husband."

4. Clement Porter.—Proves said letter to be Wescombe's writing, and general reputation that Dods and he were married.

5. Lucretia Constable.—Same as on her examination here.

6. Jane M'Nair.—James Dow had a son named Robert, his eldest son, who lived with him from Martinmass till about the beginning of April, 1741, when he went to London; James Dow's eldest daughter Elizabeth was then servant in Edinburgh, and was frequently in her father's family, but after Whitsuntide, 1741, she went to London; never heard said Robert or Elizabeth returned to Scotland; about end of March, 1741, Dods, Wescombe, and Patterson, came to Dow's house, and said *Robert Dow being there; Wescombe carried him with his company into a room; Elizabeth Dow was there in the house and deponent thought she went into the room with them, but cannot be positive; after shutting the door they remained together about half an hour, and then Wescombe called for pen and ink, and after some time they parted; Patterson went towards Edinburgh, and Wescombe and Dods towards Corstorphine.*

7. James Dow.—Deponent had a son called Robert, and daughter Elizabeth, who are now in England.

N. B. The libel in Commissary's Court says, Wescombe and Dods were married in the presence of Robert Dow, and — Dow, son and daughter of James Dow.

Sentence in Scotland 3d January, 1745, which was made absolute on 26th June, 1745, decreed Wescombe to cohabit with Dods as his lawful wife.

Witnesses on Wescombe's second allegation examined in Consistory.

1. Robert Dow, gardener.—Deponent was eldest son of James Dow, late of Castle Barnes, near Edinburgh; proves in contradiction to Jane M'Nair's evidence in the Commissary's Court, that he came from Scotland to London in February, 1740-1, and continued in and about London for several years after, and was never present at any marriage between Wescombe and Dods; and deponent's sister Elizabeth Dow, now Bostell, came to London in September or October, 1741; deponent had a brother also named Robert, who is about fifteen years old; but

deponent and his sister Elizabeth are the persons said to be present at said marriage.

Int. 2. When deponent left Scotland he left a brother Robert at home.

2. Elizabeth Bostell, alias Dow, examined 31st Oct. 1750.—Deponent is daughter of James Dow, of Castle Barnes; deponent came to England in Oct. 1741, where she has continued ever since; deponent's brother, Robert Dow, came to England about eight months before deponent, and has continued in England eight or nine years without going to Scotland; deponent was not present at a marriage between Wescombe and Dods, nor did she ever hear of such marriage till within three years past, when Wescombe called upon her and asked her about said marriage, which deponent knew nothing of; she and her said brother Robert are the persons sworn to be present at said marriage.

8. Int. Never knew of any marriage performed at respondent's father's house; cannot speak to Jane M'Nair's character; deponent's father had three sons; Robert, one, is dead.

3. Jane Morison.—Deponent is daughter to James Dow, of Castle Barnes; deponent was not present at any marriage between Wescombe and Dods, nor did she ever know of any marriage performed in her father's house; deponent's brother, Robert Dow, left Scotland in February last; was nine or ten years since, but cannot be particular which; deponent lived with her said father from her birth till 1743; her brother Robert and sister Elizabeth are the persons sworn to be present at said marriage; Jane M'Nair behaved honestly in deponent's father's house.

8. Int. Deponent's father had three sons named Robert; Jane M'Nair is a great liar.

DR. SIMPSON, Chancellor of London, was of opinion Dods ought to be admitted to her suppletory oath, as prayed by her, and she being present in court, immediately took the oath, and swore to her marriage with Wescombe; whereupon the court pronounced for the validity of the marriage between Wescombe and Dods, and gave sentence accordingly on 19th Feb. 1750-1.

Wescombe appealed from this sentence to the Arches, where the cause was heard upon the same evidence on this day, the 21st of Feb. 1752, when I ordered the suppletory oath to be read as part of the proofs, and confirmed the sentence given by the Chancellor of London, pronouncing for the marriage.

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## PREROGATIVE COURT OF CANTERBURY.

GRACE against CALEMBERG.—p. 76.

Will set aside on the ground of fraud, and for failure of proof with respect to handwriting.

*Dr. Paul's* opening for Grace.—General Frampton died 23d Sept. 1749, his will, dated 2d May, 1749, gives all his estate to Mary Grace, and makes her sole executrix. The will is opposed by Henrietta Calenberg, deceased's cousin and next of kin; will found in his bureau; he became acquainted with Grace in 1743, at Speenhamland's, where she kept a grocer's shop; he promised to provide for her, and in Oct. 1744, she came to London; the

General took lodgings for her, she dined and supped with him, and managed his affairs, and was in great favour with him; deceased died in the country: she sent notice thereof to a Mr. Joshua Sharpe, who said he was well assured there was a will. 28th Sept. 1749 she came to town; search made for a will that night, but none found; on 8th November, 1749, the will was found in his study, among papers of moment, pinned in a book, which was in his bureau. The great question is, whether the paper is deceased's hand-writing; we have proved it to be so by five witnesses on the conditit; an exhibit marked A, is admitted to be his handwriting; we have examined several witnesses, who, by comparing the will with exhibit A, swear they believe both papers were wrote by the same person; we have proved the will to be deceased's hand-writing by fifteen witnesses; they the contrary by eight. Affection to Grace proved; exhibit A, which is a draught of a will wrote by deceased, shows he intended to give all his fortune to one person, and that a woman; they have pleaded that paper A related to one Mrs. Dean, who died in 1745, but it was wrote in 1747; promises of providing for Grace proved; in June, 1749, the general told her he had settled his affairs and provided for her.

*Dr. Jenner, contra, for Calemberg.*—Calemberg is cousin-german, once removed, and one of the next of kin to deceased; he died at Battley Abbey in Suffolk, 23d December, 1749. On 28th September, Grace and Captain Rooke came to town together. Mr. Joshua Sharpe, Rooke, and Grace searched that night, but could find no will; next morning Sharpe and Rooke searched again for five or six hours. Two of her witnesses swear they did not search on the 29th. Mrs. Calemberg applied for administration 17th October. Sharpe told Grace, a caveat was entered; she replied, "I will oppose Calemberg's having administration." They have examined witnesses to prove the finding of the will on 8th November; but some say it was found in the bureau, and some in the cupboard, and vary in other particulars. Grace is a common prostitute, and is a married woman; she did not live with deceased when the will bears date, but lived in an house of her own, yet the will recites that she then lived with him. They have pleaded that deceased was in a bad state of health when he declared in favour of Grace in June, 1749, but yet her own witnesses prove he was then in good health. 2d May, 1749, Gibbs says deceased sent for him to buy him some coolers, that he waited some time before he saw deceased, and then deceased made excuse for keeping him so long, and said he had been making his will; these coolers were sent to Battley Abbey in April 1749. The main question is, whether the will is deceased's hand-writing; deceased was major-general in 1743, and lieutenant-general in 1747. Mrs. Dean died in October, 1745, while he was a major-general; he styles himself so in paper A. We insist the will pleaded is a forgery; every thing that is given to Grace will vest in her husband.

*Evidence.*

3d. Article of Grace's conditit, read by Calemberg's counsel, pleads finding the will in deceased's bureau on 8th of November, 1749, with papers of moment, pinned to a leaf of military orders.

*Witnesses for Grace.*

1. Gibbon Jones, Clerk.—Beginning of June, 1749, deceased came to live at Battley Abbey, near deponent, and then they became intimate together, and deponent often saw deceased write, and is acquainted with

his writing; verily believes the whole of the will pleaded was wrote by deceased; deponent has transcribed papers from deceased's writing.

Int. 4. Has often seen deceased write, particularly on 2d August, 1749.

2. George Wright, Esq.—Deponent first saw deceased in October, 1748; often saw him write; verily believes the whole will is deceased's hand-writing.

2. Int. Respondent was not intimate with deceased.

3. Joseph Littlewood.—In May, 1747, deponent became servant to deceased; has often seen him write; verily believes the whole will is deceased's writing; 8th November, 1749, Mr. Lechmere, Sherman, Gibbs, and deponent, searched for a will, and Gibbs found the will pleaded in a book of orders; Gibbs shook the book, *nothing fell out then; he then threw it down on the back, and it opened in the place where the will was pinned; it was in the bureau.*

1. Int. He, respondent, is not yet discharged from deceased's service.

4. Int. Respondent almost daily saw deceased write. 6. Int. They were about an hour searching for the will before it was found. 7. Int. They were not instructed to look into the book where the will was. 13. Int. Grace had the key of the bureau at deceased's death, *deceased having delivered it to her before his death.* 5. Int. Grace came frequently to deceased, and when he went out of town he left his house in her care; she dined at deceased's table.

4. John Gibbs, broker.—Deponent first came to know deceased about ten years ago, in camp at Hounslow, when deponent was servant to Colonel Lee; deponent has bought many things for deceased, and has received several notes from him, and has often seen him write; verily believes the will is all of deceased's hand-writing; deponent being sent for by Grace on 8th November, deponent, Lechmere, Sherman, and Littlewood, searched for the will; *did not find it in the bureau, but found it in a cupboard or slip adjoining to the bureau;* deponent shook several books; no will fell out; deponent said he had heard of wills pinned into books, *deponent turned over the book of orders leaf by leaf,* and when he had turned over near half the book, *he found the will;* deponent read it in their presence, and then delivered it to Lechmere, and went up to tell Grace of it.

5. Int. Deceased held Grace in great esteem. 7. Int. Was not instructed to look into the book of orders, but to search in general. 9. Int. The pin with which the will was fastened was bright; a few days after the fire-works in April, 1749, deceased sent for deponent, and kept him some time waiting, and *then deceased sent for deponent in, and said, "Gibbs, I beg your pardon for making you stay, for your time is precious, but I have been writing a little will."* 14. Int. Grace was not present when the will was found, *but was in great surprise when she was told of it.*

N. B. There is nothing in the ninth interrogatory to lead Gibbs to speak to the declarations he says deceased made to him, *that he had been writing a little will.*

5. Thomas Lechmere, attorney at law.—Deponent was present on the 8th November at the search for a will; deponent was carried thither by Sherman; Grace was in bed, and gave them the key of the bureau, and they began the search; *before Gibbs and Littlewood came,* they looked over several bundles of papers and books, &c.; deponent proposed to

look over deceased's MS. books, and desired them to turn the books over leaf by leaf, believes the search made by Sharpe was a slight one, because, on 13th November, he told deponent he had only shook the books; the will was found by Gibbs pinned to a leaf.

6. Int. Will found after about an hour's search. 14. Int. Do not remember what emotions Grace showed on the will being read to her. 15. Int. Deponent is solicitor for Grace; is not obliged to answer what meetings he has been at relating to this cause. 16. Int. Expects no reward for his evidence.

6. John Sherman.—Deponent was many years employed by deceased as upholsterer; Grace desired deponent to bring an attorney and search for a will; deponent went on 8th November with Lechmere; Grace gave them the key of the bureau, and deponent and Lechmere, in presence of Littlewood, searched, and then Gibbs came and they searched the books and Gibbs cried out hastily, "Here is something," and presently said, "it is the will;" some papers of consequence found in the same cupboard with the will.

2. Int. Respondent was intimate with deceased as one of his tradesmen for six years before his death.

7. William Hancock.—Deponent was servant to deceased; often saw him write; but has not seen him write his name as he remembers; verily believes the whole will is deceased's hand-writing.

The will read, and also exhibit A, a draft or copy for a will with blanks.

Witnesses for Calemberg.

1. Thomas Henshaw.—Mary Grace bears a bad character at Newberry and that neighbourhood.

2. John Carey.—Has known Grace twenty years; she had a general bad character, but knows no facts.

3. John Lonsdale, Esq.—Nothing material.

4. John Spackman, Clerk.—Grace had a bad reputation at Newberry; kept company with the officers, and was esteemed an adulteress; her general reputation very bad.

2. Int. Respondent had no acquaintance with Grace. 3. Cannot believe she would forge a will; knows no crime she was guilty of, save some follies and extravagances he believes she was guilty of, with respect to her husband.

5. Thomas Penrose, Clerk.—Knew Grace thirteen years ago; she was commonly esteemed a whore to the officers at Newberry, but cannot infer from thence that she would forge a will.

6. Richard Halt, Esq.—Grace reputed a whore to the officers.

7. Richard Quilling.—In 1743-4, deponent went to live as servant with deceased, and left him in March, 1748; first knew Grace in 1744 at Reading races, where she lodged in the same house with deceased; she dined at the Pelican at Speenhamlands with deceased and his officers, and no other woman was present; she was generally reputed to be whore to the officers at Newberry; she came to London in Oct. 1744, and came to deceased's house; she staid with him about an hour, and then they went out together and returned and supped with deceased at night, and went away by herself; she often came to deceased's house to dinner and supper; but when gentlemen of rank dined with deceased she was not present; in July, 1745, Grace came to deceased in the country, and staid with him one night; in January, 1746-7, deceased ordered deponent to take in no letters or parcel that came from Grace,

and gave the same orders to the rest of the servants, and ordered him not to let her in; a letter from her was refused, and she was denied admittance; but she forced her way in, and in the struggle at her getting in at the door she said she was hurt; deceased angry at her coming, ordered Sherman not to give her credit for goods; Grace did not live in deceased's house while deponent was his servant; deceased showed Mrs. Dean great regard, she died in October, 1745.

7. Int. Grace had not the management of deceased's affairs.

8. Elizabeth Quilling.—Deponent went to serve deceased in 1744, and continued with him till April, 1748; in 1744 Grace came to deceased's house with her servant and baggage; gives same account as the last witness; deceased told deponent she need not make any addition to his dinner for Grace; deposes the same as Richard Quilling about not receiving letters from her, and her forcing herself into deceased's house, &c.; deceased talked angrily to her; Dean died in October, 1745; Grace did not manage deceased's affairs.

4. Int. Believes she, Grace, breakfasted with deceased the morning she made a disturbance at his door, and forced herself into deceased's house.

9. John Spencer.—Deceased had a great regard for Mrs. Dean, and advised with her about his affairs, and allowed her an annuity of upwards of 20*l.* a year; declared he would provide for her, but did not say he would leave her his whole fortune.

6. Int. Dean refused to dine with Grace.

10. Lybiat Bodmyn.—3. Int. Deponent does not believe Grace would be guilty of any manner of crime.

11. Thomas Cowslade.—3. Int. The same. N.B. These two witnesses were only read to the 3. Int.

12. Joshua Sharpe, Gent.—Deponent well knew deceased about twelve years before, and to his death, and did business for him; Grace took possession of deceased's keys and effects at his death, particularly of his bureau; 28th September 1749, deponent went to deceased's house at Grace's desire to inspect his papers to see for a will; deponent, Grace, and Haman Rooke, Esq., searched the bureau and bookcase in deceased's study where he kept his papers of moment; they searched said bureau *with great care*, and found many papers relating to his regiment and stock, but the draft of a will marked A, was not found at that time, but was found the next day; *deponent did carefully search all the papers and MS. books, but not so particularly as to go over the books leaf by leaf, and shook said books but found no will, &c.*; deponent made appointment to search by day-light the next morning at nine o'clock. On 29th September 1749, deponent *went accordingly* next morning, but Rooke not being come, deponent and Grace again inspected said books and papers, Rooke then came and searched with them, *and deponent did then carefully, circumspectly, and minutely, inspect all the papers and MS. books found in said study, and bureau, and cupboard, aforesaid*; in examining said books, deponent looked at each end of them, and also into many of the leaves, to see if he could find any loose papers therein, and shook many of said books and laid them open with their backs downwards, and held the leaves up loose and run his hand over them in such manner as they might easily open if there were any papers between the leaves, and such papers as he found in the books he did carefully peruse; he spent a considerable time in this search but found no will; if the will pleaded in this cause had been then pinned to any of the books *and stuck out beyond*



*the leaves, he should certainly have found it ; believes he should have seen it if the will had been then pinned to any leaves of those books, but cannot depose with more certainty that it was not there ; found draft A, in a travelling case which deceased had in the country, but not in the same condition it now appears, great part of the paper having been torn off from the bottom with part of the endorsement, and with addition at the top " a copy of my will," which words were not there when it was found, and they are not deceased's hand-writing ; deponent delivered it to Grace in the condition it was found ; 17th October, 1749, after deponent had directed a caveat to be entered, deponent acquainted Grace therewith, and that Calemberg applied for administration ; she asked deponent if he had heard of any will of deceased's ; deponent said no, and did not expect to find one ; she replied she had searched every where and could not find one, and asked deponent what she should do ; deponent told her Colonel Lyttleton, for Calemberg, had applied for administration ; she expressed great emotion at the thoughts of Calemberg having deceased's estate ; deponent said he did not see who could hinder it ; she replied with warmth, that she would oppose her having the estate ; deponent has often seen deceased write and subscribe his name, and is well acquainted with his writing ; verily believes the will pleaded is not deceased's hand-writing, and was not made or signed by him, which deponent thinks is clear by comparing it with papers deponent knows to be deceased's writing ; verily believes no part of said will was wrote by deceased ; thinks the will and the papers exhibited, viz. Nos. 1, 2, 3, 4, and 5, are materially different ; proves those exhibits to be deceased's writing ; believes the will, and exhibits A, and Nos. 1, 2, 3, 4, and 5, were not wrote by the same person.*

1. Int. Has often seen deceased write in presence of several persons.  
5. Int. Thinks it clear the will is not deceased's hand-writing. 9. Int. Respondent searched *five or six hours in the two days.*

13. Haman Rooke, Esq. Deponent well knew deceased five or six years ; was with him when he died, and came with Grace to town, she possessed herself of deceased's keys and effects before deceased was buried, Grace told deponent deceased had frequently told her he had provided for her, and she sent for Joshua Sharpe to search for a will ; 28th September, 1749, deponent, Sharpe, and Grace searched deceased's bureau and book-case in his study ; *they diligently searched his bureau and cupboards, &c. and carefully inspected all the papers and shook all the MS. books ; next day Sharpe went again to deceased's house, and they all three searched again all the papers and written books, but could find no will, &c. ; verily believes, if any will had then been pinned to any leaf of a book, they must certainly have seen the same ; they found draft A in a writing-box ; said paper A has been torn and altered since ; verily believes deceased had not an intention to make any will, and did not write or sign the will pleaded ; and it is not like deceased's hand-writing, and verily believes it was not wrote or signed by him ; and it clearly appears to be a different hand-writing from the six exhibits, and was not wrote by the same person.*

9. Int. Refers to his deposition. N.B. He is asked how long time it would take up carefully to examine all the papers, &c. 10. Int. They made a search on 29th September. 13. Int. Heard deceased say Grace was of great service to him in the country, but *does not remember to have*

heard him say directly he would provide for her or leave her any thing ; in coming to town Grace said deceased told her he had provided for her.

14. Thomas Fisher, Esq.—Deponent was agent to deceased's regiment ; knows his hand-writing ; *verily believes the will pleaded is not deceased's handwriting, and was not subscribed by him, and he thinks it clear upon view of the will ;* deceased always wrote a free hand ; will is wrote in a very stiff manner ; the will and the exhibits do not appear to depend on to be wrote by the same person ; believes the will is a counterfeit imitation of deceased's writing, for most of the words in the will and draft A begin with letters in the same form, and therefore believes it was copied from the draft A.

3. Int. Esteems himself skilful in writing.

15. John Parker, Esq.—Deponent knew deceased twenty years ; knows his hand-writing ; *verily believes the will pleaded was not wrote or subscribed by deceased ; several letters, particularly the great E's, differ from deceased's hand, and the small t's and v's ; the word " revoke " is misspelt, being wrote rovoke, and deceased was a better scholar, and deponent is well satisfied he would not have described Grace his loving and affectionate friend, and is assured he would have benefitted some of the Calemborgs, to whom deponent has heard him declare he was related, and from whom he and many English officers, and deponent in particular, in Flanders, received great civilities, in respect to deceased ; it appears to deponent, beyond doubt, that the will is not deceased's hand-writing.*

1. Int. Respondent almost daily received written orders from deceased. 5. Int. The exhibits 1, 2, 3, 4 and 5, agree with one another, and widely differ from the will.

16. John Williams, writing-master.—Believes the exhibits A, and No. 1, 2, 3, 4, 5, were wrote by the same person, but the will is not wrote by the person who wrote them ; mentions many variations ; the several persons who were present with respondent to inspect the will and said exhibits, agreed they were different hands.

N. B. The exhibits A, and No. 1, 2, 3, 4, 5, are agreed on both sides, to have been wrote by deceased.

17. Charles Gardiner, engraver.—Deposes the same in all respects ; mentions several letters, and the word *and*, which he says, differ in the will from the exhibits.

3. Int. Respondent has no doubt but that the will and the exhibits were wrote by different persons.

18. William Chinnery, writing-master.—The same as the others ; *is clear the will and exhibits were wrote by different persons ; no one letter in the subscription to the will appears to be the same hand as the subscriptions to the exhibits.*

19. John Spencer.—Deponent knew deceased about sixteen years ; deponent well acquainted with his hand-writing ; *verily believes deceased did not write or sign the will pleaded ; the exhibits and will, he verily believes, are wrote by different persons.*

Witnesses for Grace.

1. Anne Phillips.—Grace and her husband lived together in reputation at Speenhamlands, and she had a good character, and took care of his affairs, and behaved with circumspection ; the husband hurt himself by his own extravagance ; deponent and Grace have dined together with deceased at Newbury, and he seemed to have great regard for Grace, and he often pressed her to come to London and live with him ; *solemnly*

*declaring to her he would provide for her handsomely so long as she lived; Grace came to town upon deceased's offer.*

2. Martha Reeves.—Grace used to be much with deceased; she always bore a good character; *deceased was in a good state of health when he went to Balley Abbey, where he died*; Grace breakfasted with him that morning; when he was going, she cried, deceased said, "Molly, what do you cry for?" she answered, "To think you are going so far;" *he replied, "You have no need to cry, I have taken care of you, for I have settled my affairs, and provided for you to your satisfaction;"* deponent understood he meant his will.

N. B. 12th Art. of Grace's allegation pleads he was in a bad state of health.

1. Int. 3tio loco. Grace has always borne the character of *a modest woman*. 4. Int. Has heard some people say, she was deceased's mistress. Respondent is servant to Grace.

3. Thomas Skuce.—Proves Grace often, almost daily, went to deceased's house, and she behaved as mistress of his house; believes deceased had a good opinion of her, and trusted her; she went to Batley Abbey in July, 1749: deceased treated her as a beloved friend and wife, *she did not lie at deceased's house in London*.

N. B. 4th Art. of Grace's allegation pleads she on 9th of June 1749, went and lived at deceased's house in Berkeley Square, till 14th July 1749.

5. Int. Does not believe any man can swear to papers being wrote with the same ink.

1. Int. 3tio loco. Grace always bore a good character.

4. Jane Sparrow.—Deponent has known Grace from a girl, she and her husband kept a grocer's shop, and she had a good character, and was esteemed a prudent woman; to make her husband's affairs easy, she parted with her jointure of 2000*l.*; she managed her affairs with prudence, and had a good reputation; deponent once dined with deceased and Grace at his house in town; knows she had the keys of his plate.

5. Jane Kite.—Has known Grace from a child; she bore a good character, and was so esteemed to do at Newberry; in Nov. 1744, she came to London; deponent had often dined with her at deceased's house in town.

1. Int. 3tio loco. *Grace behaved in a chaste and virtuous manner.*

4. Int. Has heard people say she might be deceased's mistress.

6. John Kite.—Grace was esteemed at Newberry, and bore a good character, and was not extravagant, but behaved with prudence; believes she paid many debts after her husband left her.

5. Int. 2do loco. Does not believe the will and the writing in the pocket-book were wrote with the same ink.

7. Ebenezer King.—Never heard Grace was the occasion of her husband's ruin, but she always behaved as a prudent wife, and paid some of his debts.

1. Int. She behaved with freedom, which made her chastity suspected.

3. Int. Believes she may have wronged her chastity, but not till since her husband left her. 4. Int. Has heard she was deceased's mistress.

8. Benjamin Collins.—Grace bore a good character in respect to her dealings; she paid debts of her husband's.

9. George Phillips.—Gives Grace a good character; believes her husband was ruined by his own extravagance, and not by her neglect.

10. James Brown.—Gives Grace a good character.

11. Bartholomew Price.—Grace always had a good character, and was well esteemed in her neighbourhood.

12. James Johnston.—Mr. Grace carried on a great grocer's trade with credit; never heard but that producent bore a good character in the neighbourhood.

Witnesses for Grace on another allegation.

1. John Gibbs, examined before.—Grace, to deponent's knowledge, lived with deceased about five years before his death, and managed his family, and dined with him; and deceased spoke of her with great esteem; and believes such esteem continued to his death; 28th April, 1749, deponent sent to deceased's country-house sundry household goods of various kinds, and *particularly coolers*; on 2nd May 1749, or thereabouts, deponent received a message from, and went to deceased in the morning, and waited some time, but at length was called up, and then deceased said, "*Gibbs, I ask your pardon for making you wait, for I know your time is precious; but I have been about some material business, writing a little will,*" or *to that effect*; and then gave deponent orders to go to Batley Abbey to get the goods put up, which deponent did on 5th of May.

N. B. 7. Art. of Grace's allegation read, pleads deceased on 2d of May sent for Gibbs to buy some coolers.

4. Int. Cannot be exact to the day when such discourse passed; but it was about 2d of May. 5. Int. Believes the writing in folio 11 of pocketbook, and the will, *were not wrote with the same ink*. 8. Int. Believes the will was wrote with the free hand as the exhibits are.

2. Thomas Lechmere, Gent.—Bolt and deponent, as commissioners for appraising deceased's effects, were two days employed above four hours in inspecting deceased's papers; proves exhibit marked C., signed Charles Frampton, entered in the Auditor's office.

N. B. 8th Art. of Grace's allegation pleads the 11th folio of pocket-book was wrote with same ink that was in deceased's standish on 2nd May, 1749, with which he wrote the will; and the said 11th leaf was wrote by deceased, *and that and the will were wrote with the same ink*.

5. Int. *Believes folio 11 and the will were wrote with same ink*, for Littlewood told deponent deceased complained of the paleness of his ink, but cannot be certain. 8. Int. Subscription to exhibit C. is wrote stiffer than the other subscriptions, but the name to the will appears as if it had been amended.

3. Lancelot Craven.—Deponent was intimate with deceased from 1744; Grace was often with deceased, and he once said to her, "Mrs. Grace, why do you fatigue yourself so," his value for her seemed to increase.

5. Int.—There seems to respondent to be an apparent difference in the ink of the will and of the 11th folio of the pocket-book.

4. John Hill proves exhibit C, and saw deceased sign his name to it.

5. Int. Believes the ink and writing of the pocket-book and will are different. 7. Int. Thinks there is a diversity between some of the letters of the will, and of the exhibits, &c.; but, upon the whole, believes they were wrote by the same person; all the exhibits seem to be the same hand, and believes the will was also wrote by the same hand, but with more care.

5. Martha Hughes.—Deponent was servant to Grace, and is so now;

*Grace was very ill when Sharp and Rooke searched for a will, and they did not then make a diligent search, not staying above half an hour, as deponent remembers; and deponent heard Sharpe say he would defer the search till Grace was better, saying, he was sure there was a will in the house, and he would come again and make a further search, but he never did, though Grace sent for him several times for that purpose, so that there was only a search by them on the night Grace came to town, when she was better, a fresh search was made by other persons.*

3. Int. Deponent constantly attended Grace, and does not believe she was out of her chamber during her illness.

6. Martha Prior, formerly Reeves.—Deponent was housekeeper to deceased at his death; says search was made for a will by Sharpe and Rooke on the evening of the day Grace came to town, and she was then very ill; *they searched about half an hour; Sharpe told her, when she was better he would come and make a further search, but he never did; believes she was not out of her room for six weeks; no further search was made till 8th November.*

2. Int. Respondent was with Grace all the day of 29th September, when she kept her bed.

7. Henry Macdonald.—Deponent was coachman to deceased at his death, and is now coachman to Grace; deponent carried a letter to Sharpe on deceased's death, Sharpe told deponent the deceased, about twelve months before, had taken his will from him and threw it in the fire, and said deceased then wrote something which he apprehended might be his will: and Sharpe said, "Sure, there must be a will, and it must be at Berkeley Square house;" the night Grace came to town, she sent deponent for Sharpe to search for a will.

N. B. Sharpe's declaration, which this witness deposes to, is not pleaded.

8. John Sexton.—Grace sent for deponent as her apothecary, *on or about 30th September, 1749, and she was very ill, and continued so all October.*

5. Int. Believes folio 11 and the will are wrote with different ink.

9. Joseph Littlewood.—Grace lived with deceased for some years, and acted as mistress of deceased's family, and believes deceased had great value for her; about May, 1749, deceased complained his ink was thin; proves the deceased wrote the particulars in folio 11 of pocket-book, in deponent's presence, with the ink then in his standish, which was the same he had had from April before, proves exhibits A and C.

5. Int. Cannot swear the will and folio 11 were written with the same ink. 7. Int. Believes the will and exhibits were all wrote by the same hand.

10. Henry Rand, clerk.—Deponent has known Grace five years; has often dined with her and deceased at his table, and he treated her very civilly; deceased was offended with deponent, who was chaplain of deceased's regiment, for asking leave to be absent of a superior officer, and deceased ordered deponent to his regiment in Ireland; Grace interceded for deponent with deceased, and he then consented deponent should stay in England; from thence deponent concludes deceased had affection for Grace.

11. Thomas Johnston.—Nothing material.

8. Int. The will is wrote better than the exhibits.

12. Edward Thoroughgood, engraver.—The will and exhibits, and

'the folio 11 of the pocket-book, and the subscriptions were all wrote by the same person.

5. Int. The ink in the pocket-book is more yellow than the will. 7. Int. Believes the will and all the exhibits are the same hand, and seem to be wrote with equal swiftness, and the subscriptions Cha. Frampton, to all of them were wrote *by the same person*; believes deceased amended name Cha. at a different time, and the witness adds several suppositions. 8. Int. Respondent thinks the will was wrote with the same ease as the exhibits, and believes it impossible to have imitated the deceased's hand better than the will appears to be.

13. Emanuel Austen.—Verily believes the will and exhibits were all wrote with the same hand, but will seems to be wrote with more care.

5. Int. Does not believe the folio 11, and the will were wrote with the same ink. 7. Int. Believes the exhibits and names thereto, and will were all wrote and signed by same person. 8. Int. Believes will was wrote with more care, but with the same freedom as the exhibits; the same as the last witness.

14. Thomas Kitchin, engraver.—Deposes same as former witness; thinks it impossible to imitate the exhibits so exactly as the will does.

5. Int. Does not believe the will and folio 11 were wrote with the same ink. 8 Int. Same as the last witness; will seems to be wrote with same freedom as the exhibits.

15. Charles Grignion, engraver.—Same as the former witnesses; believes the will and exhibits were wrote by the same person.

5. Int. Thinks the will and folio 11 might be wrote with the same ink. 8. Int. Believes will was wrote with same freedom, but more care than the exhibits.

16. Joseph Champion, writing-master.—Deposes the same as the other witnesses.

5. Int. Will and folio 11 are not wrote with same ink. 8. Int. Same as the other witnesses.

17. Thomas Undeshagen, school-master.—Verily believes the will and exhibits were all wrote by the same person, but the will was wrote slower and with more care.

5. Int. Believes the will and folio 11 were not wrote with same ink. 8. Int. Does not believe the will was wrote with the same freedom as the exhibits.

*Dr. Paul's argument for Grace.*—Grace has a good character; proved by Phillips that deceased declared he would provide for her; she came daily to deceased's house, and conducted his affairs; Rand said she had great influence over deceased; exhibit A allowed to be deceased's hand-writing, and shows he intended to die testate, and to leave all his fortune to one woman only; Grace sent to Sharpe to give notice of deceased's death; Sharpe said, "Surely there must be a will," and added, "He had a will which he destroyed about a year before; Rooke told her he would give her 2000*l.* for what she would get; Sharpe did not search very carefully. *Lord Gerard of Brandon's will*, he was dead twenty years before it was found; administration twice granted; will attested by Judge Raymond and others; sentence for it both in Prerogative and Delegates; Compton, one of the witnesses, swore he never did attest it; but Lord Gerard's hand and Judge Raymond's were proved, upon which the will was established. *Chancellor Freeman's will* not found till fifteen years after his death: then found in the Theodosion Code; held to be a

good will. This will not found on first search; 8th November, a second search made, will found in his study by Gibbs and three others; they differ in nothing material; the grand question is, whether the will is deceased's hand-writing? We have examined twelve witnesses, who agree it is his writing; eight witnesses, contra, that it is not deceased's writing. Where witnesses differ, credibility is to be considered; their witnesses swear so positively and strongly that credit cannot be given to them; Martha Reeves deposes, that in June, 1740, deceased said he had provided for her, &c.

*Dr. Pinfold*, same side.—Grace's character in general well supported; she behaved well in her trade; their witnesses do not believe she would be guilty of forgery; deceased showed great affection for her; the Quilings prove affection for her till the end of 1748; afterwards it increased and continued to his death; no proof of more than one quarrel between them, and that made up immediately: Rooke believed she had an interest in deceased; no proof of affection to Calemberg throughout the evidence, nor any proof of intercourse between them; clear, deceased intended to die testate; exhibit A, was wrote between 1743, when he was major-general, and 1747, when he was made lieutenant-general, because he describes himself therein as major-general; declaration to Gibbs on or about 2nd May, that he had been making his will; this declaration corresponds with what Reeves swears the deceased declared to Grace on the day he went out of town, viz., that he had provided for her; the search on 28th September was a slight one; there is a contrariety as to the search on 29th September; two witnesses swear against Sharpe and Rooke, that there was none; her servants swear she kept her bed all day on 29th September, and on 30th, the apothecary swears she had a violent fever. Fisher believes the will was a copy from exhibit A, and therefore believes the will is not his hand; but if deceased copied it, he would naturally write with the same initial letters.

*Dr. Hay*, same side.—Calemberg is by herself alleged to be only one of the next of kin; the will is opposed as a forgery merely; they attempt to prove it, first by collatio literarum; our writing-masters (a) say, "it is an original hand, there is a sameness between the will and exhibits." Secondly, by opinion of deceased's acquaintance; Rand's evidence respects the time between February, 1748 and May, 1749. Martha Reeves proves a recognition of the will on 9th June; Gibbs speaks strongly to deceased's declaration on 2d May; Gibbs must be perjured, if the will is set aside; deceased went to Berkeley-square in the spring, 1745; Dean died in October, 1745; Spencer swears Dean would not dine with Grace, and Grace dined there every day, and was therefore in more favour than Dean; it is probable there was no such search on 29th September, because Grace was extremely ill; she sent for Sharpe several times, and he would not come near her; improbable that Grace should put the will into a place that had been searched before; forged wills have all been attested; no care taken to prevent the husband's having the estate, which shows it was deceased's act, for a forger would have known, that what is given to a wife absolutely would vest in her husband.

*Dr Jenner's* argument for Calemberg.—Shall chiefly insist on the in-

(a) *Reilly v. Revett*, Prerog. 28th July, 1792, 1 Phill. 80, notes; *Heath v. Watts*, Prerog. 29th November, 1798, *ibid.* 82, notes; *Beaumont v. Perkins*, Prerog. 26th April 1809, *ibid.* 78.

ternal evidence from the paper itself; they pleaded it was found in the bureau, but it was found in a cupboard, *in a book where there is no entry later than 1740*; very improbable he should put his will in such a place; she purchased a house in London, which she must have done with the deceased's money, and therefore he had provided for her; paper A has been altered; the words at top, "*A copy of my will*," not deceased's hand; the will is a transcript of A, so far as it goes; but A is prepared for execution with an attestation; the will says, "have put my hand and seal," but no seal, no attestation, though real estate is devised; if deceased made his will in 1748, A cannot be a copy of that will; they have pleaded that the will must be deceased's writing, because he wrote another paper with same ink, but the witnesses prove the contrary.

*Dr. Smalbroke*, same side.—The only method to detect a forgery is from circumstances; Grace impatient to find a will, but yet no search made from 17th October to 8th November; to show there was a second search, Sharpe and Rooke produced it; contradicted by Hughes and Prior, formerly Reeves; incredible he should carry the draft A with him into the country, and yet should leave the will at home; but one receipt produced by Grace to compare with the will.

*Dr. Bettesworth*, same side.—The will unsealed and unattested; Martha Reeves swears the apothecary advised Grace to have a physician: he swears he did not advise her so; evidence of the forgery arises from the paper itself.

#### JUDGMENT.

SIR GEORGE LEE.

Upon the evidence above stated, and view of the will, which appeared to me not to be the same handwriting as the exhibits, which were acknowledged to be wrote by deceased, on 4th Session, Easter Term, 9th May, 1752, I gave sentence against the will, and pronounced that as far as appeared to me, General Frampton was dead intestate, and decreed administration to Mrs. Calemberg, from which decree Grace's proctor appealed to the Delegates, *ad statim*.

19th February, (a) 1754, this sentence was affirmed by the Delegates, with 200*l.* costs.

(a) The Judges Delegates present at the sentence were—

The Earl of Northumberland	Mr. Baron Smythe
Bishop of Oxford	Dr. Walker
Bishop of Bangor	Dr. Simpson
Lord Sandys	and
Mr. Justice Forbes	Dr. Collier.

#### BARON VON SOLEND AHL v. DR. HAMPE.—p. 102.

A physician not entitled to call for an inventory, as a creditor, for fees due from the deceased.

BARON VON SOLEND AHL, late Envoy from the King of Denmark, made his will, and appointed his brother executor; a requisition was prayed to swear the executor in Denmark. A caveat was entered by Dr. Hampe, as a creditor who prayed an inventory; the caveat was entered on the 18th February, 1752. On the 17th March, his proctor prayed



an inventory, and was assigned to make oath of his debt. On the first session of Easter Term, Dr. Hampe gave in an affidavit, and therein swore, that the deceased was, at his death, really indebted to the deponent 2000*l.* for attending him day and night as a physician, for two years and a quarter; and annexed to his affidavit a certificate signed by Dr. Mead, Sir Hans Sloane, and Sir Edward Hulse, upon a case stated by Dr. Hampe, in which they say, that they think an eminent physician who gives up his whole time for two years and a quarter to one particular patient, and neglects all other business, will well deserve 2000*l.* for such attendance.

The proctor for Solendahl, alleged, that the affidavit does not ascertain any debt; that Hampe is not naturalized, and cannot legally practise here as a physician, and denied him to be a creditor.

*Dr. Hay* for Solendahl.—A physician cannot sue for fees; he must have them at the time of his attendance, or not at all. *Hawkins' Pleas of the Crown*, 1st Part, fol. 87, an unauthorised physician is guilty of felony if the patient dies.

*Dr. Smalbroke*, contra.—Fees are recoverable. *Dr. Doon v. Lady Blount*, Dr. Doon prayed an inventory as a creditor for fees, for attending Sir Harry Blount, as a Physician; he swore to a debt of upwards of 100*l.* This Court granted him an inventory. 1st Roll's Abridgment, fol. 517.

#### JUDGMENT.

SIR GEORGE LEE.

I was of opinion, that fees to physicians or lawyers, were by the civil law merely honorary, and were not to be demanded, or recovered; but supposing they were recoverable at common law, it must be upon a quantum meruit, to be settled by a jury, which must depend upon the eminence of the physician, and the loss he suffered by giving up his other patients; and though Dr. Hampe estimated his attendance at 2000*l.*, yet a much less sum might be thought a sufficient compensation by a jury, and consequently that here was not such a certain fixed debt as would entitle him to an inventory; and as to the certificate of the physicians upon a case stated by Dr. Hampe, it was not evidence, and I could not take notice of it.

I therefore rejected Dr. Hampe's petition, and decreed probate to pass under seal to the executor, and a requisition to swear him.

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#### THOMAS against EVANS and Others.—p. 104.

Administration cum testamento annexo, decreed to the next of kin.

JOHN THOMAS, deceased, made his will, 3d May 1743. James Thomas executor, cancelled it, but afterwards deceased wrote on another paper, *I will have my will stand as to the legacies, but not as to the executor.* Evans, a trustee in the will, entered a caveat; several next of kin; James Thomas claimed administration cum testamento as residuary legatee.

The Court ordered him to be called to propound his interest as such, if he thought proper, otherwise decreed administration cum testamento to three of the next of kin.

SPENCER, formerly WAPPING, against HAWKINS and  
LONG. (a)—p. 104.

The capacity of a testator established.

*Dr. Hay* for William Hawkins.—William Hawkins, executor of Eliza Wapping, who died 12th Dec. 1745. Deceased was cook of the Prince Frederick, privateer, which took the two great prizes, the Marquis d'Antin and the Louis Erasme. Prince Frederick arrived at Cork in Sept. 1745; deceased sold his share, and then married Eleanor Carroll; they lived together about three weeks; in October she made him drunk, stript him of every thing, and left him; he was so distressed, he was forced to beg; deceased was recommended to Hawkins to endeavour to set aside the sale of his share in the prize; and Hawkins did relieve and assist him, and boarded him at Ellis's, where he fell ill of the small-pox, and died; made his will on 6th December 1735; divided his effects amongst William Hawkins, John Long, Eliza Ellis, and Joan Slack; deceased declared his wife used him very ill; and she should have nothing of his; the will attested by three witnesses one of whom is dead; instructions, execution, and full capacity, proved; Hawkins proved the will 25th April, 1746; Wise bought deceased's share of the prize; and it appears in evidence that he has bought off Long, Ellis, and Slack; and it is probable he is at the bottom of opposing the will, for which a citation did not issue till September 1749; deceased, as cook to the Prince Frederick, had two shares, one only of which was sold to Wise; the wife has endeavoured to prove she had the small-pox; and therefore left her husband; we have proved she had it long before her marriage.

*Dr. Simpson*, for Spencer alias Wapping, the wife.—Hawkins filed a bill against Wise to set aside the sale; deceased's two shares were worth 1200*l.*; deceased was a black Moor; he and his wife kept a public-house, and lived very affectionately together for about eight weeks, as some of the witnesses say, which was in November 1745, at which time she was taken ill, and deceased advised her to go to her father's, to be taken care of; she went from the cove of Kinsale to Cork, and she then had the small-pox; deceased sent several times to her father's, to inquire how she did; and expressed concern that he could not go to her, because he had not had the small-pox; when she was up he went to Cork to see her at her father's, there he got the small-pox of her, and died in November, 1745; two of the witnesses persuaded deceased to apply to Haw-

(a) This case and some others which will be found in this collection, seem to involve questions of fact rather than of law, and on this account, it was my primary intention to have altogether omitted them; but upon consideration that the cases of this description were but few in number, and that the omission of them would break in upon the entirety of the work, which as it is now presented to the public, comprehends *all* the MS. notes of Sir George Lee, on *all* the cases that were submitted to his judgment during the six years that he filled the chair of the two highest Ecclesiastical Courts of the country, I have yielded to the opinion of those who have been anxious that these cases should also fill their respective places in this publication. Undoubtedly they must augment our admiration of the accuracy, the precision, and the extraordinary diligence, of the learned person whose judicial habits they unfold; and I am also willing to hope that the traces they exhibit of succinct pleading, and consequently of pertinent evidence, may not be without their use in furnishing suggestions to those who are conversant with the diffuse style of pleading, and the masses of cumbersome evidence which more recent practice has introduced into the proceedings of the Ecclesiastical Courts.

kins to get him his prize money; Hawkins then sick in bed; 16th November, 1745, deceased gave him a letter of attorney to recover his prize-money; Long and Keeff witnesses to it, and Keeff is one of the witnesses to the will; when Hawkins had got this letter of attorney, he then boarded deceased at Ellis's, at six shillings a week; Hawkins boarded several other seamen at Ellis's; the will bears date 6th December, 1745, the day Hawkins set out for London; Elizabeth Ellis declared to her son that Wapping was in the height of his sickness, "*and we must contrive to get a will from him.*" We have proved he was then insensible; no instructions for this will; deceased could neither write nor read; no declarations of deceased, that he had made his will; the writer of the will says, Hawkins sen. was present at giving instructions; Hawkins himself swears he was not present; their witnesses swear he was perfectly sensible all his illness, but it will appear he was very raving; their witnesses contradict one another as to deceased's wife making him drunk in October, 1745, and then running away from him with his effects.

Witnesses for Hawkins.

1. Dennis Keeff.—Deponent went with Alderman William Hawkins and John Long to deceased at Ellis's house; deceased then gave deponent instructions for his will; deponent took them down and made a will; deponent read it to him; deceased made some alterations therein; deponent drew it over again at Long's office; deponent and Long went again to deceased; Long read it to deceased, and he approved it, and was at both times of perfect mind; 6th December, 1745, deceased executed it in presence of deponent, John Boote, and John Ellis; Boote was a surgeon, and is since dead; he attended deceased as his surgeon in his illness; was a person of good credit; proves his subscription to the will.

1. Int. Respondent knew deceased two months before his death; had lodged at Ellis's about three weeks; died three or four days after the date of the will. 9. Int. Only one shilling left to deceased's wife, by his order, because she had used him ill; believes the motives for making the will were the care Hawkins and the others had taken of him, and he had great dislike to his wife. 4. Int. Hawkins was empowered to recover deceased's prize-money, but believes he did not recover it. 5. Int. Deceased's two shares were worth about 1000*l*.

2. John Ellis.—Proves execution of the will and deceased's capacity; Boote was surgeon to deceased; he is dead, but was a person of good credit; deponent saw Boote sign his name to the will as a witness; says the will was read over to deceased in deponent's presence, and deceased approved it.

4. Int. Has heard Long has received 25*l*. from Wise. 8. Int. Deceased was of sound mind all his illness. 9. Int. Deceased declared his wife had robbed him, and therefore he left her only one shilling.

3. Lucy Boote.—Says her husband, John Boote, told her he had witnessed deceased's will, and well remembers he told her, *that when deceased was giving his directions about his will*, John Long asked him what he would give Dr. Boote in his will; deceased replied, "If I live, I will pay him, and if I die, he must be paid;" Boote was deceased's surgeon in deceased's illness; proves Boote's hand-writing as a witness to the will.

4. Hovell Farmer, M. D.—Proves Boote's hand-writing, and gives him a good character.

3. Bartholomew Graham.—Deponent was on board the Prince Frederick with deceased, before Christmas, 1745; deponent saw deceased sick at Ellis's, and he thanked God for raising to him such a friend as William Hawkins was, and expressed high regard for Hawkins for his great care of him, *and then said he was well pleased with what he had done for them*, the legatees, which deponent understood to relate to his will; deceased then cursed the whore (meaning his wife) for robbing and leaving him in his then distressed condition, and said they might have lived happy together.

The will read.

Witnesses for Spencer.

1. Catharine Liddell.—Deponent is intimate with producent; deceased showed great affection to her whilst they lived together; Hawkins and Long are solicitors for sailors; about a week or fortnight before deceased was taken ill, deponent was with him at producent's father's house, when deceased told her said father he must live near Hawkins, who was to recover his prize-money; deceased was a stranger to Hawkins till near his death; believes deceased had no acquaintance with Long; deceased had no knowledge of Ellis or Slack till he went to lodge at Ellis's; deceased and his wife lived together from their marriage till producent was taken ill in November, 1745; deceased then advised her to go to her father's to be taken care of; producent and deponent went by deceased's advice to her father's; the small-pox came out, and she was removed into the country about four miles from Cork, and deponent went with her, and she there had the small-pox in a violent manner; deponent attended her, when she was better, to her father's at Cork, where deceased came to see her, and expressed the greatest affection to her; producent was then very weak; about two or three days after, deceased got the small-pox, of which he died; her father and mother often sent her word deceased inquired kindly after her, and wanted much to see her, but did not dare to come to her while she was ill; deponent was going to see deceased, and saw him run out into the street with a blanket on him raving, when he had the small-pox on him; producent never did misbehave to deceased; deponent lived with them, and they were very loving.

2. Mary Harrington.—Deceased was delirious in the small-pox, and was so for several days, and to his death; deponent was servant to John Ellis, and was informed of every thing that passed at Elizabeth Ellis's; the second day of deceased's illness, he took to his bed; deponent every day saw him; one morning, Elizabeth Ellis, in deponent's presence, told John Ellis, her son, *that they must contrive to make a will for Eliza Wapping that day, for that he was in the height of his distemper*; she thereupon went out, and soon after, same day, John Long and Dennis Keeff, Elizabeth and John Ellis, went into deceased's room, and soon after, John Ellis went out and fetched pen, ink, and paper, but what passed in the room deponent knows not, but is sure deceased was incapable of making a will *from the second day of his illness*, which happened in the beginning of December, 1745.

3. John Bryan.—Deceased was cook in the Prince Frederick; deponent was with deceased at his wife's father's in November, 1745; deceased could not read or write, and was a very ignorant man.

4. Julian King.—Deponent was intimate with deceased and his wife, and lived in their house at the Cove, in Kinsale, and they lived very affectionately together, till she went to her father's on having the small-

pox; deceased *eagerly inquired after his wife, and expressed great love for her after she went home*; deponent has gone by Ellis's door when deceased was ill, and heard him then calling for his wife.

5. Timothy Denhayly.—Says that deceased one day came to deponent's father's house in his illness when he was quite raving, and had only one shoe on, and threw stones at the house, and *demanding his wife*; came again the next day in the same manner; Ellis's house is in Cork.

6. Margaret Gogan.—A little before Christmas, 1745, deceased went to live at Ellis's; deponent saw him twice in his illness; he was then raving, and deponent saw him in the street in his blanket, calling for his dear Ellen; deponent saw Ellen near her father's about that time in a very weak condition, and she was then with the marks of the small-pox on her.

7. John Eustace, clerk.—Proves that he married deceased and deponent in September, 1745.

8. Edmund Wade.—Before his illness, deceased appeared to be crazy; deponent has seen him almost naked; while he was sick at Ellis's, deponent went to see him, and believes he had then no more senses than a stone; deponent heard the maid of the house say *he was constantly talking of his wife; and it was reported he was always talking of her affectionately, and was mad at that time*; knows nothing of the will; but one day, as deponent was going by Ellis's house after deceased's death, heard said maid in an angry manner say to somebody in the house, "It is not all one as making a will for the deceased, Wapping, after his death."

9. Sarah Sterely.—Knew deceased and deponent; was deponent's servant, and deponent was present at their marriage; heard him express affection for his wife, and she for him.

10. Joseph Popham.—Hawkins is a solicitor for prizes, and has heard Long is the same.

N. B. Long was one of the executors, and was excommunicated for not giving in his answers, but he did appear.

Witnesses for Hawkins.

1. Robert Watson.—Deponent well knew deceased and his wife; in October, 1745, as deponent was informed, she left him, and removed some of deceased's goods; she sold deponent a tea-kettle, and desired deponent would not tell her husband; deceased told deponent the next day that his wife had robbed him and taken all he had, and that if he should ever be worth any thing again, she should never be the better for him; deceased was reduced so low that he begged about the streets, and declared she had robbed him; deceased made diligent search for his wife; she was marked with the small-pox.

2. Elizabeth Beacher.—In October, or beginning of November, 1745, deceased begged in the streets at Cork, and exclaimed against his wife, and said she had robbed him and stript him of all he had; has heard him say, if he had the world, she should never be the better for it.

3. Thomas Alder.—In October, 1745, deceased told deponent that his wife had robbed him of all he had, and left him; deceased begged in the street; deponent relieved him, and gave him two shillings; deponent and others, at deceased's request, searched for her and his effects, but did not find either; deceased expressed great aversion to her; Hawkins was a merchant, and sold wines, &c. at Cork; deponent gave Hawkins a power to sue for deponent's prize-money, and deponent advised deceased to do the same, and he went to Hawkins for that purpose in Novem-

ber, 1745; deceased's wife was marked with the small-pox; deceased in November went to lodge at Ellis's; deponent went several times to see him in his last illness; he expressed great kindness for Hawkins, and said he paid for his board and lodging, and clothes; and said he must have perished, if it had not been for Hawkins and Long; deponent saw him within three days of his death, and never saw him insensible; Boote was his surgeon; Hawkins went to England about a week before deceased died.

8. Int. Never heard deceased lost his senses.

4. Thomas Bathews.—Deponent heard deceased say he had been robbed by his wife of all he had; 26th October 1745 deceased told Alder and others that he heard his wife was concealed at a certain house; they went and searched, but could not find her or the goods; deponent went to see deceased in his illness, and he appeared in his senses.

5. Jeremiah Line.—Deponent was often with deceased in his illness; often heard him complain his wife had robbed him; heard him in his last illness express great regard for Hawkins, Ellis, and Slack; never heard him say anything delirious, but the night before his death, to the best of deponent's knowledge; deponent was with deceased the day of making his will, and he was sensible, to the best of deponent's knowledge; heard deceased say he had made his will.

6. George Cowdee.—Deponent saw deceased begging, and he then said his "wife had robbed him of all he had in the world."

7. Catharine Line.—Deponent saw deceased in the streets like a beggar, before he lived at Ellis's; has often heard him say, his "wife had robbed him;" Hawkins paid for deceased's board and lodgings; and deponent has heard there was an agreement between Hawkins and deceased about his prize money; has heard deceased express great regard for Hawkins, Long, and Ellis, and he desired Slack to attend him; deponent saw him several times, and he was not delirious in his illness, and was then capable of making his will.

8. Mary Shehan.—Deponent saw Ellen at her father's house in October, 1745, and deceased was about said house; believes she went from thence to avoid her husband, for deponent heard him say "she did not like him, because he was a black;" has seen him in a very poor condition, but did not hear him beg; Ellen deemed to be in good health when she came to her father's, and believes she had not then the small pox, for she had as great marks of the small pox fourteen or fifteen years ago as now, and soon after deponent saw her, and she had no redness.

9. William Wood.—Heard Tim Carroll advise his daughter to get deceased's effects, and then leave him; and they consulted deponent and others thereupon; but cannot tell whether it was before or after marriage; has heard her say, she would do so; and since her marriage, she said, she "married only with an intention of getting his money, and then leaving him." Deponent saw in her custody some of deceased's effects; she told deponent "she had left him, and she had not left him a pin's worth that she could bring away;" deceased came in search of his wife, and deponent gave him victuals; deceased went to see for her at her father's, and she told deponent she went out at the back-door to avoid him; believes he had then no love for her; deponent saw deceased begging in Cork; deceased several times searched for his wife at deponent's, and other houses, and she hid herself; deponent saw her going with her sister into the country to sell pedler's ware before he came to search for her.

10. James Fitzgerald.—In October 1745, deponent saw deceased on horseback, with good clothes; about a month after he appeared very shabby, and he then said, he was "robbed and stripped by his wife;" in November and December 1745, deponent lived opposite to Ellis's, and two or three times saw Hawkins, the party in this cause at Ellis's.

(N. B. Hawkins was then sick in bed.)

Deponent, in deceased's illness, often heard him express great regard for Hawkins, and appeared to be in his senses.

11. Philip Murphy.—Deponent heard deceased declaim against his wife, because she had stript him of all he had; deceased used to beg ale and drams; believes she when to Cork to abscond from her husband; deponent saw deceased about three or four days before his death, he seemed to be in his senses; believes the will pleaded is Long's handwriting.

12. Mary Wood.—Before Ellen married, and on the night of the marriage, she told deponent she married deceased for the sake of his money, and if she could get it she would quit him; she showed deponent some of his effects after she had left him, and then said, as he had spent all his money, she secured what she could; proves Ellen hid herself from deceased at her father's; heard deceased say, she had robbed him; deceased begged at Cork, and said, he was so reduced by his wife's robbing him; verily believes she had not the small-pox after her marriage.

13. Robert Travers.—Heard deceased say his wife had robbed him, he begged in the street, and was extremely poor; Hawkins was a merchant at Kinsale.

14. John Baker.—It was the common report at Kinsale, that deceased was made drunk, and then his wife ran away with his effects; has heard deceased declare so, and he begged in the street.

15. Colbert Wood.—Deposes to report as the former witness; deceased complained to deponent that his wife and her friends had robbed him of all he had.

16. Catharine Dent.—Deponent lodged in deceased's house when his wife left him; deponent bought a bed of her, she believes without deceased's knowledge; about October 1745, deponent saw deceased and his wife's father and family drinking punch, and about an hour after, deponent came down and found the house stripped, and Ellen and her friends gone, and deceased lying drunk; deponent awaked him and told him he was robbed, and made a great noise, and said he was robbed of every thing he had, and used to swear he would murder her if he could find her; he left his house because he had lost every thing, and he begged in the streets; verily believes she had the small pox before her marriage.

17. Martha Baker.—Deceased told deponent his wife robbed him of all he had, and expressed great anger against her.

18. James Leary.—Common report that deceased's wife had robbed him and reduced him to beg.

19. James Harling.—Common report his wife had robbed him and he begged.

20. Prudence Wood.—The same; and says deceased told her his wife had robbed him of all he had but the clothes on his back, and said if he could find her he would murder her.

21. Eleanor Kerrigham.—Deceased and his wife lived together about seven or eight weeks; deceased told deponent he was drunk the night before, and his wife had robbed him of every thing, and said she

had taken his handkerchief from his neck, and buckels from his shoes, and expressed great resentment against her, and he was reduced to beg; verily believes she did not leave Cove on account of illness, for she was very well the day before.

22. Abraham Dent.—The night deceased and his wife were married, deponent heard her say she would not have married him if she could have compassed his money before, and said she would soon compass it, and then she would quit him, and said she did not marry the black son of a bitch for his person, but for his money; and some time after deponent told deceased of her said declaration and he seemed not to credit it; one day said Ellen proposed to deponent to go away with him, and said "Mr. Dent, you have some money in your wife's keeping, and I have pretty well compassed Wapping's money, and if you will take your money from your wife, I will put mine to it, and we will go away together, for I have lost my shame by him, and we can do very well together;" deponent asked her where she would go; deponent refused; she begged he would keep it a secret; swears he missed several goods out of the house; three or four days before she went away she sold a bed to deponent's wife; the night before she went away deponent was in company with deceased, his wife, her father and others; he believes her friends and they pressed deceased to drink, and he soon got drunk, and about nine or ten at night deponent was standing at deceased's door, and saw Ellen going out with things in her lap; deponent asked her where she was going, she answered "I have lost my shame by that black devil, Wapping, I have now got all I can get, and I will leave him to shift for himself and be damned;" then deponent went into a little room, where he lay in his clothes, and could not awake him he was so drunk; then deponent went out and saw horses with panniers, on which he believes she carried away every thing; nothing was left in the house; two or three hours after, deponent came and waked deceased, and on finding he was stript, he was in a very great passion; he had from that time great resentment to her.

(N. B. He fully proves the robbery.)

A few days after, deponent went with deceased to search for his wife at her father's; deponent asked for her; her father would not own her being there, and would not let them in.

23. Julian Duncan.—Ellen told deponent she believed she should soon be rid of her husband; heard deceased declare his wife had robbed him.

24. James Baldwin.—Believes deceased sold his share of his prize money to Wise.

25. Francis Woodley.—The will is the handwriting of Keeff, and the signature is the hand-writing of Long.

26. Margaret Baldwin.—Has heard deceased declare his wife had robbed him, and had reduced him to begging; deponent recommended deceased to apply to Hawkins to recover his prize-money; Hawkins was then sick in his bed; deponent went again with deceased to Hawkins, and afterwards deceased told deponent he had given Hawkins a letter of attorney; Ellen has no fresh marks of the small-pox; deceased expressed the greatest regard for Hawkins.

27. Thomas Allen, gent.—Believes the will is the handwriting of Keeff, and that the signature is Long's handwriting.

28. Rebecca Briggs.—Deponent saw deceased a day or two after he



was taken ill, when the pock was filling, and about two days before his death; at both said times he talked sensibly and was able to make a will.

29. James Murphy.—Says deceased told him his wife robbed him of every thing, and he might starve but for Hawkins and Long, and often mentioned his obligations to them in his illness; he was in his senses till the day before his death, whenever deponent saw him, and talked sensibly.

30. William Hawkins, alderman.—William Hawkins, the party, is deponent's son, and is a merchant; deceased and others applied to him for assistance in recovering prize-money, and deceased gave him a power; deceased requested producent, in deponent's presence, to board him at Ellis's; producent went to London on 6th December, 1745, early in the morning, and was then very lame, and had been so a month before; deponent did not see deceased during his illness, and was not present when instructions were given by him for making his will, nor knows to whom he gave them; believes the will was wrote by Keeff.

(N. B. The letter of attorney from deceased to Hawkins, is dated 16th November, 1745.)

*Dr. Hay's* argument for Hawkins.—The wife never came to see him in his illness; a strong circumstance to infer she ran from him; King, their witness, proves deceased did not know where his wife was; fully proved he begged in the streets, and yet Liddell swears her father pressed deceased to live with him; good ground of affection to Hawkins, Long, and to Ellis, and Slack, who took care of him in his illness; Keeff is positive to all the material requisites of the factum of the will; the presence of Alderman Hawkins is a collateral, and not a material, circumstance.

*Dr. Simpson*, contra, for Spenser.—From the nature of deceased's distemper, he could not be in his senses all his illness; Long's only merit was drawing the letter of attorney; no previous declaration of making a will, and benefiting the legatees.

JUDGMENT.

SIR GEORGE LEE.

29th June, 1752, I gave sentence for the will, but without costs.

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### BRANSBY against HAINES.—p. 120.

Will of a wife, made on the presumption that her husband was dead, revoked.

*Dr. Bettesworth*, for Samuel Bransby.—Margaret Bransby deceased made her will, described herself widow, made John Haines executor and residuary legatee; will dated 2d September, 1742; Samuel Bransby, as husband, called in the probate; alleged he was married to deceased on 14th July, 1725, by license, at Hoxton Chapel. We have examined one witness who was present, and have proved cohabitation, with reputation, for six years; in 1731, he fixed at Birmingham, and she went to service. He was informed by her brothers that she was dead; 7th October, 1731, he married another woman, which is the sole objection to us; identity of persons proved; both deceased and Bransby thought each other dead.

*Dr. Pinfold*, for John Haines, the executor.—Deceased died in Octo-

ber 1750; will is all of deceased's own handwriting. We denied Bransby's interest; admit he has proved his interest, but hope there is no room for costs.

*Per Curiam.*

Sentence for the interest but without costs.

**BURGIS, by his Guardian, against BURGIS.—p. 121.**

The interest of a minor son being established, an administration granted to a brother, is revoked.

**DR. Pinfold**, for Joseph Burgis, a minor.—Joseph Burgis died intestate; Richard his brother took administration as next of kin; the minor, as deceased's son, called in the administration; Richard denied his interest. The minor has proved deceased was married at the Fleet to Jane Matthews his mother, and has proved owning and cohabitation in St. Giles's Parish in 1737; the marriage was in 1730; we have pleaded an affidavit of deceased's, that he was married, and that the minor was his child, and we have pleaded a letter from Richard to deceased, in which he speaks of deceased's wife and child.

Witnesses for the minor.

1. Richard Burman.—Well knew deceased from 1728, and also Jane Matthews, who was servant to deceased's father; proves cohabitation and owning as husband and wife in Wardour-street, and she was delivered of Joseph, the minor in this cause; they removed into St. Giles's parish, and lived there as husband and wife for several years; afterwards he went beyond sea, and the child lived with his mother; the child was admitted into Covent Garden charity school as the son of Joseph and Jane Burgis his wife.

2. James Knight.—Proves exhibit A, to be Richard Burgis's handwriting, and that it was wrote to deceased; Richard therein mentions deceased's son being in the free-school.

3. John Springer.—Proves the exhibits B. and C.

N. B. The brother pleaded, but did not examine any witnesses on his allegation, and no counsel appeared for him at the hearing.

**JUDGMENT.**

**SIR GEORGE LEE.**

I gave sentence for the interest of the minor, and condemned the brother in costs upon taxation the by-day, and revoked the administration granted to the brother, and decreed it to the guardian for the use of the minor.

**DR. PRINGLE, Attorney of M'GUIRE, against BROWN, in the Goods of JOHN CONNELL, deceased.—p. 123.**

The interest of a sister being established an administration granted to a more distant relation is revoked.

**DR. Pinfold**, for M'Guire.—John Connell, deceased, died intestate in April, 1750, a bachelor; left Mary M'Guire, James Connell, Catharine and Elizabeth Connell, his brother and sisters. 10th May, 1750, James Connell took administration to him and is dead intestate. 22d July,

1751, Mathew Browne took administration to James as cousin and next of kin, and on 26th July, 1751, took also administration de bonis non to John Connell; M'Guire has cited Brown to bring in the administration of John Connell, &c. Browne denied M'Guire's interest as sister to deceased; we have fully proved her interest.

Witnesses.

1. Judith Bullen.—Deceased left one brother and three sisters; Mary M'Guire was one of his sisters; deponent was present at the marriage of Barnaby Connell and his wife, the father and mother of John Connell, deceased, and Mary M'Guire, and of James Connell, &c.; believes Mary M'Guire was born about forty years ago.

JUDGMENT.

SIR GEORGE LEE.

I pronounced for Mary M'Guire's interest, as sister and next of kin; revoked the administration de bonis non of John Connell, and decreed it to the attorney of Mary M'Guire, and condemned Browne in costs, to be taxed moderately, because he was not by the evidence affected with knowledge of M'Guire's being alive, and had not pleaded.

### BIGG and Others against KEEN.—p. 124.

A will propounded and established; administration cum testamento annexo, granted to the residuary legatees, the executors having renounced.

Dr. Hay, for Thomas and Frances Bigg and Mary Bayley.—John Bigg died 20th July, 1750; left John and Edward Keen his nephews and only next of kin; made his will 17th July, 1750, and appointed executors who renounced. Will propounded by residuary legatees; opposed by John Keen the nephew; full proof of instructions, capacity, and execution. The nephew has pleaded incapacity, but his witnesses prove the contrary, and also deceased's disaffection to his nephews.

Dr. Pinfold, contra, for John Keen.—Deceased has made only a mark to the will; Francis Bigg, senr. one of the residuary legatees, died four years before deceased, and he knew of his death; admit they have proved capacity and execution, but hope the Court will not give costs.

The adverse proctor declared he should not ask costs.

Witness.

James Lowther.—Deponent took instructions for the will; fully proves them, and capacity and deceased's approbation of the will, and due execution; deceased attempted to write his name, but was not able, and then he made his mark, and sealed and published it.

Other witnesses agree.

JUDGMENT.

SIR GEORGE LEE.

Sentence for the will, and administration cum testamento decreed to the residuary legatees.

### BRISCOE against BRADISH.—p. 125.

A will propounded and proved.

## ARCHES COURT OF CANTERBURY.

The Governors of St. Thomas's Hospital in Southwark, acting by LEE-SON, their Syndick, against TREHORNE and COVE.—p. 126.

*(An Appeal from the Commissary of Winchester upon a Grievance in rejecting an Allegation.)*

The patrons of a church have no right to controvert the election of church-wardens; unless it can be shown that the parishioners have no right to elect church-wardens, and that the church-wardens of the particular parish are exempt from the jurisdiction of the ordinary.

## PREROGATIVE COURT OF CANTERBURY.

MARTIN against WOTTON.—p. 130.

A will made in extremis established.

*Dr. Simpson*, for Wotton.—Mabella Millechamps made her will 18th February, 1750; had the palsy and died 9th March, 1752; by will 18th February, 1750, Martin made executor, and had a legacy; 8th March, 1752, deceased made another will; she was taken ill in the night between 7th and 8th March, 1752; declared she was dissatisfied with her will, and ordered her maid to send for Mrs. Wotton to make her will; Wotton wrote three or four legacies, and then she went to fetch Mr. Baldwin, an attorney, with whom she was not acquainted; deceased gave instructions to Baldwin, of which he took minutes; drew a will from those instructions, read it to deceased in presence of witnesses; she approved it and attempted to execute it, but she had the palsy so much in her hands that she could not write or hold her pen, and therefore could not execute it; the writer says she did not execute it because she was not capable; the other witnesses say she was sensible.

*Dr. Paul*, for Martin.—By will 18th February, 1750, Martin made executor; in will 8th March, 1752, Ann Wotton, executrix; the last will not executed because deceased was incapable; instructions deficient; Baldwin brought to make the will; deceased said Wotton would tell him what to write, and from Wotton he took the instructions. Admit it was read to her; but the grand question will be, whether she had capacity; Martin has not examined any witnesses.

Witnesses for Wotton.

1. *Ann Tate*.—Deceased lodged at Mrs. Le Fitz, in Craven street on 9th March, 1752, when she died a widow without children or relations. Deponent has heard deceased say she had known Wotton thirty years, and had great affection for her; deceased had the palsy; deponent sat up with deceased in the night between the 7th and 8th March; in the night she bid deponent send for Mrs. Wotton at six in the morning; deceased impatient for that hour to come; expressed dissatisfaction at her will; deceased very impatient for Wotton to come; as soon as it struck six deceased bid deponent go to Mrs. Wotton's and desire her to come;

deceased told deponent what legacies she would give; deponent fetched Wotton; asked deceased if she should fetch any body else, she said "No;" deceased bid deponent fetch a box and set it by Wotton and said her will was there, which she bid Wotton take out, and then desired Wotton to set down several legacies, which deponent heard, and deceased said Wotton should be executrix; Mrs. Wotton said she could not make a will; deceased consented she should bring somebody else; Wotton went for an attorney; deceased very impatient for her return, and said Wotton was gone to fetch a person to make her will; about nine in the morning Wotton returned with Baldwin; Baldwin asked deceased what he should write in her will, she said she had told Wotton; Baldwin told her he must have it from her own mouth; deceased declared she was fully in her senses; deponent heard deceased give instructions to Baldwin for some of the legacies, and then deponent went down, but soon after deponent was called up again, and Baldwin was then reading a paper to deceased; Baldwin asked her if she liked it, she said "Yes," he asked her if she would sign it, she said "Yes;" wax was not immediately found; deceased then bid deponent look in the bureau where deponent found wax; deceased raised herself up to sign her will, and she bid deponent to sit at her back to support her, and then Baldwin bid deponent fetch Mrs. Blondy and Mrs. Le Fitz to be witnesses; deceased asked what Blondy came for, Wotton told her she must have two witnesses, she replied, "that is true;" deceased attempted to execute the will but was not able through weakness of her hands; she two or three times attempted it, but could not do it; Baldwin went away, but left directions for sending for him if she became capable; deceased said she believed it would do; she was perfectly sensible.

2. Letitia Wotton.—Deponent has renounced her interest under the will; gives account of a message from deceased to deponent by Tate on 8th March, 1752; agrees therein with Tate; deponent went to deceased; gives exactly the same account as Tate of what then passed between them concerning making her will, and mentions the legacies deceased bid her write; the first five lines of paper A, are wrote by deponent; deponent desired she might fetch somebody else to make deceased's will; deceased consented; deponent went to fetch Baldwin, who was an entire stranger to deponent; he came; deceased seemed pleased; deponent asked her if she would tell Baldwin what she would do; Baldwin asked deceased several questions; latter part of paper A. was wrote by Baldwin; believes the will in question was wrote by Baldwin from deceased's instructions, the former will, and what deponent told him; he read the will to deceased and she approved it; gives same account of deceased's attempting to execute it, as Tate does; deceased perfectly in her senses; deponent asked deceased if she should send for Mr. Joseph Martin; she replied "No."

3. Samuel Baldwin.—About eight in the morning of 8th March, 1752; deponent went to deceased, pursuant to Mrs. Wotton's directions; deponent took instructions from Wotton by deceased's desire, in deceased's presence, she being very weak; from such minutes he wrote the will, and read it all over to deceased, and asked her if she liked it, and she said either "yes," or, "it is very right;" does not remember any body was in the room but deponent and Wotton; deceased raised herself up to execute her will, but she was so weak she could not write and then her senses were so low that she seemed not to know what she

was about, and she threw herself on her knees very eagerly, but believes it was from pain; when deponent first came to her she was fully in her senses, and believes she well understood the will when deponent read it to her, and she did approve it, but before execution he believes she lost her senses; deponent left orders to send for him in case she became capable.

4. Jane Blondy.—Proves deceased's affection for Mrs. Wotton; heard deceased say the will was to her liking, and that she would sign it, but her hand shook so much that she could not write; deponent and her aunt were twice afterwards called to see deceased execute it, which she attempted with earnestness, but was not able; deceased at said times of attempting to execute, appeared to be very sensible.

5. Louisa Le Fitz.—Proves deceased's affection to Wotton and her children; agrees exactly with Blondy; says deceased endeavoured for ten minutes to write her name, but could not do it, she did make a scratch, but Baldwin said it would not do; swears deceased was perfectly in her senses.

JUDGMENT.

SIR GEORGE LEE.

I gave sentence for the last will dated 8th March, 1752, which was not executed.

### RICH against CHAMBERLAYNE.—p. 134.

Administration decreed to a guardian elected by the free consent of a minor.

Dr. *Simpson*, for Rich.—John Chamberlayne died intestate and insolvent; left a son, Wells Chamberlayne, and two sisters; deceased boarded at Mrs. Carstairs's, at Bristol; the son ten years old; by desire of Mr. Rich, as creditor, a letter was wrote to deceased's sister, Mrs. Wescomb, to desire she would not intermeddle, but would let the creditors take administration; Rich took the minor and put him to school at Bristol, and took care of him; the child averse to choosing his aunt Wescomb guardian; Wescomb prays the administration for the minor's use, but is not chose guardian by him; we have affidavits to prove Wescomb is very poor, and cannot give security.

Dr. *Hay*, same side.—Rich is elected guardian by the minor.

Dr. *Pinfold*, contra, for Wescomb.—Rich at first, cited the minor to show cause why he should not accept or refuse administration, &c. Wescomb has sworn Rich has taken the child from her.

JUDGMENT.

SIR GEORGE LEE.

It being admitted that Rich was elected guardian by the minor, freely and without force or imposition; I decreed the administration to him for the minor's use.

### APPLEBY, by his Guardian, against APPLEBY and JACKSON.

—p. 135.

An administration cum testamento annexo, decreed to a grandmother during the minority of an executor, she being also testamentary trustee.

**Dr. Paul**, for the minor.—John Hervey deceased, by his will dated 11th December, 1751, devised his lands to his nephew, Thomas Appleby; gave him most of his personal estate, and constituted him executor and residuary legatee; and appointed Elizabeth Appleby, the minor's grandmother, and Richard King, his guardians and testamentary trustees; Hervey had not power to appoint a guardian to the minor; he is above eight years old, and has chosen his mother, Hannah Appleby to be his guardian, and she prays administration cum testamento to be granted to her during the minority; the grandmother, Elizabeth Appleby, prays it may be granted to her as testamentary guardian; she is greatly indebted to the estate. At common law there are four sorts of guardians, 1st, in chivalry; 2dly, by nature, which are parents; 3dly, in socage; 4thly, guardians for nurture, which the ordinary may appoint. By stat. 12 Car. 2, c. 24, (sec. 8.) a father has power to appoint guardians to his minor children: 3 Levinz, 395, *Clench v. Cudmore* (a). In the case of *Villareal*, in chancery, the Court decreed the guardianship of her children to Mrs. Villareal, and took them from Mr. Da Costa, their grandfather.

**Dr. Hay**, for Elizabeth Appleby.—2nd January, administration cum testamento was decreed to the testamentary guardians; 22nd May, the minor chose his mother guardian. The question is, whether deceased had not a power to appoint a trustee for managing the estate he has given to the minor.

Affidavit read for Hannah Appleby.

Richard Williams.—Elizabeth Appleby is indebted to deceased's personal estate in 350*l.* by mortgage, and by note in 50*l.*

**Dr. Paul**, for the minor.—No instance of a limited administration. Chancery Precedents, 597, parents are guardians of their children by nature. *Carlisle and Wells*, the guardian appointed by this Court, can be only with respect to the personal estate.

**Dr. Pinfold**, same side.—Stat. 12 Car. 2, has been always taken strictly, and therefore a mother cannot appoint a guardian to her children. Shower's Reports, 293, Court cannot revoke a probate, or refuse one to an executor.

JUDGMENT.

SIR GEORGE LEE.

I decreed administration cum testamento during the minority of the executor, to Elizabeth Appleby, the grandmother, not as guardian to the minor, but as testamentary trustee named in the will.

(a) The only point decided in this case was, that copyholders were not within the provisions of 12 Car. 2, c. 24, s. 8, consequently that it was not competent to them to dispose of the custody of their infants, but that the custody was in the lord or others according to the custom of the manor.

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### Dame ELIZABETH COOKES WINFORD against HELLIER and BARRINGTON,—p. 137.

In a suit touching the validity of a will, the Court refused to make an order on the party propounding the instrument, to oblige him to declare that he never would hereafter propound any other of the testamentary papers then before the Court.

## HIGGINSON against COLCOT.—p. 138.

Will set aside because it was not the free and voluntary act of the deceased.

**Dr. Simpson**, for Higginson.—William Hibberd, widower, deceased, died 24th May, 1750; left three children, Alice, George, and Ann, all under seven years old; Colcot, their aunt, assigned guardian to them; she entered caveat against granting probate of deceased's will; will dated 15th May, 1750; *recites, that deceased was indebted to Higginson about 200l., and for securing it deceased gives all his estate real and personal to Higginson, in trust to pay his own debt, and then to distribute the residue to his children, share and share alike, and made Higginson, sole executor*; attested by two witnesses; Glass, one of them, says deceased was not in his senses; he contradicts himself so much that no credit can be given to him; no proof of incapacity at the time of the execution; depose only to incapacity on the next day, viz. 16th May, 1750.

**Dr. Hay**, for Elizabeth Colcot, the guardian.—Uncertain on what day deceased died; he was a wheelwright; bought timber of Higginson; was indebted to him in 200l.; he frequently pressed deceased for the money; threatened to arrest him for it, and frightened him; deceased declared his aversion to Higginson; deceased's illness was a fever, with convulsions; he was insensible seven or eight days before his death; 15th May, 1750, in the morning, deceased was very ill; was quite delirious in the evening; Platt, one of the witnesses, says he went with Higginson to deceased; proves a fact of execution, but no proof of instructions; Glass swears he does not think deceased was in his senses; capacity at best but doubtful; deceased was constrained to make the will.

Witnesses for Higginson.

1. Elizabeth Freeman.—Deponent was servant to deceased to his death, which happened on 17th May, 1750; on 15th May deceased very sensible and capable of making a will, and continued so to be till between twelve and one o'clock in the morning following, when he became insensible, and from thence continued so to his death.

2. John Platt.—Deponent went to deceased with Higginson, found him ill in bed; producent asked how he did; answered he was better than he had been; producent told him he had brought a will according to his desire, and then produced the will pleaded, ready wrote; deponent asked deceased if he should read it over to him; deceased consented thereto; deponent read it, and deceased approved it; deceased then executed it, in presence of deponent and Glass, and published it, and they attested it; believes deceased was then of sound mind, and talked sensibly, and desired producent to remember his, the deceased's, wife and family after he had satisfied his own debt; this was on the 16th May.

3. Benjamin Glass.—Producent called deponent up into deceased's room, and asked him if he could write his name; deponent said "No," but could make his mark; deponent's master, the deceased, wrote something at the foot of the paper, but he does not know what, and laid a shilling on the wafer fixed to said paper writing, and then said something of delivering it as his deed or will, and then Platt wrote something to said paper, but he does not know what, and deponent put his mark thereto; deceased was in so bad health that deponent does not think he



was capable of doing any serious act ; will was not read over while deponent was present.

Will read.

Witnesses for Calcot.

1. Benjamin Glass.—Deceased died on a Thursday, in May, 1750, but does not know the day of the month ; deceased died a widower, and left three infant children ; deceased indebted to Higginson, but could not pay it ; Higginson continually pressed him for it ; deceased told deponent he hated Higginson, and wished he could buy timber of any other person ; he told deponent so about a fortnight before he died ; was delirious for eight days before his death, during that time, not capable of making a will ; when deponent saw him on the Friday before deceased died, Higginson and Platt came together in a chaise to deceased's house, and went into his room ; Higginson called up deponent, and bid him make his mark to that paper, which was the will, but deponent did not know what it was, but believed it to be a note for a load of timber which was then to be sent for deceased's use ; does not think deceased was then capable of making a will, or giving such note or order, and cannot say whether deceased said any thing, or spoke to any body during all said time ; deponent saw deceased once in his illness, when he was light-headed, go to his necessary-house ; don't know what day ; the beginning of the week next before his death deceased's head was shaved for laying on a blister ; his speech left him three days before his death ; immediately after deceased's death, Higginson took possession of his effects.

4. 5. Int. Has not been instructed or rewarded. 9. Int. Has not been paid any thing for his trouble in coming to give evidence.

2. John Woolward.—Deponent was servant to deceased ; knows Higginson, to whom deceased was indebted upwards of 200*l.* ; deceased expressed dislike to him ; was light-headed the day before he died ; deponent did not see deceased the day the will is dated ; deceased was speechless a few hours before he died ; Higginson took possession of deceased's effects.

2. Int. Gives Glass a good character. 4. Int. Glass received half-a-guinea by order of the Court for coming to be sworn.

3. John Hibberd.—Deceased was deponent's brother ; he dealt with Higginson for timber, and was greatly indebted to him ; within two months of deceased's death, he declared he hated Higginson, and would not deal with him if he was not in his debt ; such dislike continued to his death ; deceased was ill about a fortnight ; for eight days before his death he was delirious and and incapable of making a will, and for five days was speechless, but before was raving and tore off his blisters ; on a Friday night, about nine days before his death, deceased was with great difficulty kept in his bed, and cried out, there were two men come to take him away ; a blister was applied to his head three days before he died ; Higginson took possession of deceased's effects.

Int. Believes Glass to be a very honest man.

4. Dinah Ford.—Deceased was deponent's son ; he died on Holy Thursday, 24th May, 1750 ; deceased told deponent he was afraid Higginson would arrest him ; and therefore was obliged to deal with him ; but if he could get out of his debt, he would never have any thing to do with him again ; deceased was taken ill on 11th May, viz. the Friday se'enight before his death, and after the three first days, he became quite insensible and continued so to his death ; on the Monday se'enight be-

fore he died, blisters were put on his back and arms, but he tore them off on the Sunday morning before he died, he being quite raving; said there were three men at his bed's feet come to take him away, and then a blister was laid on his head; Higginson sent every day to inquire after deceased: knows nothing of the will.

2. Int. Glass a very honest man.

Higginson took possession of deceased's effects.

5. John Cock, apothecary.—15th May 1750, between six and seven in the morning, deponent was called out of his bed to attend deceased; deponent immediately went and found him in a strong fever; and was then informed he had had a very bad night, and had been delirious; he complained of pain in his head; deponent ordered him a blister on his back; deceased gave proper answers, but does not think he could then have given instructions for a will; this was the first time deponent attended him; in the evening of said day deceased was much worse, and he continued to grow worse to his death, which, as deponent thinks, happened on 22d or 23rd day of May; on the 16th May deceased was very bad; from the evening of the 15th May, deponent is positive he was not capable of giving instructions for a will.

Witnesses for Higginson.

1. Moses Bradley.—Deponent has known Platt seventeen years; gives him a very good character; does not believe he would be a witness to any will that was not duly executed.

2. Joseph Willett.—Has known Platt nine years; gives him same character.

3. John Dwight.—Has known Higginson thirty years; says he believes him to be a very honest man, and would not obtain a will fraudulently.

4. John Jackman.—Has known Higginson twelve years; the same.

5. John Adams.—Has known Higginson twenty years; the same.

N. B. Above twenty other witnesses were examined to Higginson's general character, who all speak well of him.

1st Art. of Higginson's allegation read.

Alleges deceased did not deal only with Higginson for timber.

6th Art. Deceased in his senses all day of the 15th and 16th days of May.

7th Art. Higginson was but once in deceased's room besides the time when the will was executed.

8th Art. Deceased said he was better on 15th May.

9th Art. Deceased gave instructions for the will.

Note. He did not attempt to prove any of these articles.

Witnesses for Colcot.

1, Richard Earl.—Deponent has known Higginson upwards of fourteen years; knows nothing of his character, save that, in September, 1748, deponent was present when ten chaldron of coals, delivered by Higginson for the almshouses at Hoxton, were measured by the city meters, who found them wanting upwards of twenty bushels; the Court of Assistants of the Haberdashers' Company ordered Higginson should never serve them again with coals.

5. William Mackerness.—Deponent is of the Court of Assistants of the Haberdashers' Company; deposes to the same fact as the last witness.

3. Fotherby Baker, gent.—Has known Higginson from May, 1742;

cannot speak to his character of honesty; gives a very particular account of the transaction relating to the coals; says, upon measuring the coals, twenty-four bushels were wanting out of ten chaldrons; they were again remeasured in Higginson's presence, and were then also found very deficient; he would have been prosecuted, if he had not made friends with the Court of Assistants; the governors have not paid him for them.

*Dr. Simpson's argument for Higginson.*—Admit instructions were not proved, but it is sufficient if we prove fact of execution and sanity; Platt swears it was executed on 15th May, and that he was sensible; Freeman swears the same; Glass swears contrary to his act, and contradicts himself, nobody but he says deceased was insensible on 15th May; Glass and Hibberd swear he was insensible for eight days before he died; he died on 24th May, and therefore did not become insensible till the 16th; the will only secures a just debt; the children must pay it, whether the will subsists or not; we pray costs against the guardian, who has unreasonably opposed it.

*Dr. Bettesworth, same side.*—It is still in dispute whether Higginson gave short measure of coals or not; counsel advised against prosecuting him; we do not suggest this will was made out of kindness to Higginson, but merely to secure his debt; could not prove subsequent declarations, because none of our friends were about him.

*Dr. Hay, contra for Colcot.*—We oppose this will on two points; 1st, because deceased was not mentally capable; 2d, because he was not a free agent. Freeman, their witness, proves deceased was insensible in the night of 15th May. A person may be a good witness who contradicts his own act; so held in *Butler and Parmenter's case* (a), Deleg. Uncertain whether it was executed on 15th May; a will must be a voluntary act. Swinb. 453 (Swin. part 7, sec. 2, 3, and 4, ed. of 1803); a will made through fear is void, particularly fear of imprisonment, p. 454; threats void a will. No reason to believe deceased would prefer Higginson to all his other creditors, who are hurt by such preference; if Higginson is executor, who can inquire into his debt? Higginson pleaded his own character, which led us to plead his bad character; no declaration of deceased in favour of Higginson.

*Dr. Smalbroke, same side.*—They undertook to show capacity at the time of the execution; deceased was in so weak a state as to be liable to be imposed on; *Adams and Adams* (b), Deleg., Cauldwell, the parson, was received as a legal witness, though he deposed contrary to repeated acts of his own.

*Dr. Simpson's reply.*—No proof of terror at the time of executing the will.

#### JUDGMENT.

SIR GEORGE LEE.

I gave sentence against the will, as not being the free and voluntary act of the deceased, who had constantly declared an aversion to Higgin-

(a) *Butler v. Parmenter*, Deleg. 23 Nov. 1750. This case appears to have undergone considerable discussion, and to have been argued on the 26th and 31st of Oct., and on 2d, 8th, 9th, and 15th of Nov. The Judges Delegates present at the sentence were,—Lord Chief Baron Parker, Mr. Justice Birch, Dr. Chapman, Dr. Hay, and Dr. Ducarel.

(b) *Adams v. Neville*, calling herself *Adams*; Deleg. 13th Feb. 1749. The Judges present at the sentence were, Mr. Justice Wright, Mr. Baron Clarke, Dr. Walker, Dr. Chapman, Dr. Collier, and Dr. Salusbury.

son; and yet if this will should stand, deceased had thereby given him an undue preference to the other creditors, by making him executor, and decreed administration to Calcot as guardian, for the use of deceased's infant children.

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## ARCHES COURT OF CANTERBURY.

LINE v. HARRIS.—p. 146.

*(An Appeal from Exeter.)*

Of common right the incumbent has the nomination of a minister to a chapel of ease within his parish. Exception proved in the present instance.

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## PREROGATIVE COURT OF CANTERBURY.

BETHUN against DINMURE.—p. 158.

A will withheld by a creditor ordered to be brought in on the application of the executrix.

JOHN CRAGGS made his will and appointed his sister, Bethun, executrix, and gave his will to her to keep; Bethun left it in the hands of Mrs. Dinmure; Craggs is dead, and Dinmure refuses to deliver back the will to Bethun, the executrix, till she has paid her a debt she says Bethun owes her.

A decree has been personally served on Dinmure to bring the will into Court.

JUDGMENT.

SIR GEORGE LEE.

I ordered her to bring it in peremptorily by the 28th of July, 1752.

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BURRELL against EASTLOW.—p. 159.

An administration improperly granted in the Court of the Archdeacon of Norwich, called in and revoked.

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HERVART against GENERAL GUISE.—p. 160.

An imperfect testamentary schedule pronounced against.

DR. Pinfold, for Hervart.—William Guise, Esq. son of General Guise, died on 10th April, 1751, a bachelor, æt. 22; left his father and two uncles and an aunt by his mother. Deceased had an estate by his mother's will; and by his father's marriage settlement the mother had power to make a will; she died in 1749, and gave by her will all to her

son if he came to age, and if he did not, she left all to her own relations. Deceased with his own hand wrote his will or testamentary schedule, in which he left an annuity of 60*l.* to Mrs. Assaily, and the rest to his father, and in case of *his death*, to the testator's two uncles by his mother. Maximilian Hervart, one of the uncles, has propounded this paper (which is not dated, signed or executed,) as substituted residuary legatee therein named; the General opposes it. The paper was found by Mrs. Assaily, who delivered it to Mr. Aufrere; deceased had great affection for Mrs. Assaily; in September 1750, one Mr. Guy, at desire of Mrs. Assaily, spoke to deceased about making a will, and he then declared he would give Assaily 50*l.* a year, and the rest to his father. No. 2 is a draft made by Guy pursuant thereto, and was approved by deceased in November, 1750. Hervart has examined three witnesses, but the General has examined none.

*Dr. Simpson, for General Guise.*—After deceased's death, Mr. Aufrere brought the papers, Nos. 1 and 2 to General Guise. Hervart is not by the paper, a substituted residuary legatee, *since the General did not die before his son*. I shall make that a point to show Hervart has no interest to propound this paper; 3d May 1751, General Guise took administration to his son as dying intestate; 1 sess. Trin. 1751, the administration called in by Hervart; Guise appeared by his proctor, and denied his interest; the General took out citation contra omnes to come into judgment; 1 sess. Mich. 1751, Hervart propounded the will; none of the others appeared. They have not proved the General's marriage settlement, or his wife's will; they have proved that deceased declared to Guy that he would do something for Assaily; but Guy swears he believes deceased so declared at his importunity merely. Guy several times solicited deceased to execute draft No. 2, but he constantly refused. It is not proved that No. 1, the paper propounded was wrote subsequent to No 2, and No. 1 is not proved to be deceased's writing; they have pleaded that Assaily found No. 1 wrote in a book, and she tore it out and gave it to Mrs. Robothon, and she delivered it to Mrs. Aufrere, but the fact is, that Assaily showed it to Robothon, and said she showed it her as a proof of deceased's affection to her. The day deceased died, Assaily came with a message from deceased to his father, to inform him deceased had no will, and desired his father would give certain things to persons deceased named.

*Witnesses for Hervart.*

1. Susanna Robothon.—Deponent well knew deceased and his relations; he died in April 1751, æt. 22; left his father, and two uncles and an aunt by his mother; deceased was in a declining way for three years before his death; his fortune was left him by his mother's will, but he could not dispose of it till he was at age; but if he died under age, it was to go to his uncles and aunt; Assaily was governess to deceased's mother, and her sister, Mrs. Guise, died in October 1749; Assaily had the care of deceased, and he often declared affection for her, and declared he would make his will, and leave Assaily 60*l.* a year; deponent has heard deceased desire Mr. Guy to draw a will for him. No. 2 is that draft which was delivered to deponent by Assaily the day deceased died; *deponent never saw deceased write, but has received notes from him*; says No. 1, the will propounded, *is different from the letters or notes she has received from deceased, and therefore cannot take upon her to say No. 1 is his handwriting, although she is greatly inclined to believe it is*; deponent

received said paper No. 1 from Mrs. Assaily about three or four hours before deceased died; and she desired deponent to deliver it to Mr. Aufrere from him, to show it to General Guise; Assaily told deponent she took it out of a book belonging to deceased.

8, 9, 10. Int. Respondent first saw No. 1 about three or four hours before deceased's death, and about an hour after his death, Assaily gave it to deponent; about four months after she told respondent she took said No. 1 from some papers of deceased's lying on a table, but before she said she had taken it out of a book, and said she tore it out unknown to deceased; and there was other writing on the same paper, but she had destroyed that part. 11. Int. Assaily told deponent she declared to the General the day deceased died, that he had made no will, but he desired Miss Hervart might have his tea kettle, &c. and others might have certain specific legacies, and the General said what he desired should be complied with, and bid Assaily tell him so, and she acquainted deceased therewith, and she returned with deceased's thanks to his father thereon.

2. Israel Anthony Aufrere, clerk.—Deponent is an executor to deceased's mother; deceased very sickly; his fortune came to him by his father's settlement and his mother's will, but if he died under age, his fortune was to go to his mother's relations; deponent has heard that Guy drew a will for deceased, by his own desire; *deponent believes the schedule No. 1, is deceased's handwriting, as it very much resembles his subscription, but deponent never saw him write any thing but his name*; the day deceased died, Robothon brought No. 1 to deponent, and desired him to carry it to General Guise; he did, and the General said, "It signified nothing," deponent replied, "I beg your pardon, for it is his handwriting, it is a declaration of his will;" General Guise said, "He would think of it." The General did not say it was not deceased's handwriting.

Read for Guise part of Hervart's allegation.

4. Art. Pleads, that deceased told Guy, "He would make a will for benefit of Assaily," &c. Guy drew a will pursuant.

6. Art. Pleads that deceased wrote No. 1, in a book of consequence.

3. William Guy.—Deponent knew deceased from his infancy; deceased had been very ill some months before his death. Believes deceased had a regard for Assaily, but never heard him declare so; at Assaily's request, deponent at several times pressed deceased to make a will in her favour, but he put deponent off, and deponent again mentioned it to deceased the September before his death, and he then said, "He would do it, and that it would be but short, and that his intention was to give Assaily 50*l.* a year, and the rest to his father;" and he then gave deponent other instructions relating to said annuity, and desired deponent to make a draft of a will pursuant thereto, but told him he need not be in a hurry about it; deponent accordingly made a draft from said instructions, and about six weeks afterwards carried it to deceased, and read it over to him, and he seemed to approve thereof, and said, "That's well," and he then locked up said paper, and told deponent, he would appoint another time for his writing it over fair; deponent several times spoke to deceased about finishing it; but he always put deponent off, and said, "He would do it another time;" explains initial letters in said draft No. 2; *never saw deceased write any thing but his name, and cannot depose whether No. 1 is deceased's handwriting or not*; Assaily told deponent she tore No. 1 out of a book the day after deceased died; de-

ponent was present when Aufrere brought No. 1, and No. 2, to General Guise, who said he would take counsel's opinion on them.

1. Int. Deponent spoke to deceased about making his will, at the repeated solicitations of Assailly, and he did not at first give deponent directions for making a draft, and deponent pressed him to do it, but he several times declined giving deponent orders for a will, and said, "We will think of it another time;" and believes he at last gave directions, not from his own motion, but because deponent pressed him thereto.

2. Int. When the directions were given, deceased seemed to waver.

3. Int. Draft was carried to deceased about November, 1750; deponent read it over to deceased, and he then refused to look thereon, and said, "Give it me, we will put it to rights another time."

4. Int. Deponent afterwards at Assailly's request, spoke to deceased to finish his will; but at all such times deceased refused to proceed, and put deponent off to another time; he last spoke to deponent about it about three months before his death. 5. Int. Deponent was at General Guise's house the *Sunday before deceased died, and deponent then sent deceased word he was ready to assist him in finishing his will*; deponent sent the message by Assailly; she brought answer, that he could not see deponent then, he was so ill, and *that he would defer it to another time*; deponent never saw him afterwards. 6. Int. Deceased never told deponent, "He would write his will himself;" and believes if deceased had had any settled intention to have made his will, he would have employed deponent to finish it.

Read the Schedules No. 1 and 2.

*Dr. Pinfold's* argument for Hervart.—There can be no doubt but that Hervart is a substituted residuary legatee; the words carry it, and it is agreeable to the settlements, and to the schedule No. 2. This point was determined by the Court when the allegation pleading the will was admitted. Deceased had intention to die testate, and declared to Robothon, that "He would leave Assailly 60*l.* a year;" the schedule is clearly deceased's handwriting.

*Dr. Hay*, same side.—General Guise took administration, though he knew of schedule No. 1; Hervart's interest was denied by Guise. The objection was argued and over-ruled, and the allegation was received by the Court. Two points; 1st, whether the paper propounded is the act of deceased; 2nd, whether he has done any act to destroy it, or whether it is destroyed by act of law. He deferred finishing his will from indolence; No. 1 is agreeable to the draft No. 2; Aufrere clearly proves the schedule No. 1 is deceased's writing; Robothon believes it, but Guy is doubtful. Prerog., Case of *Martin and Michell*; imperfect paper kept many years, but established as a will. Departure from intention must be proved; Deleg. (a) *Cunningham and Smith*, an unexecuted paper established.

(N. B. A fixed resolution of the testatrix that that paper should operate as her will, was in that case fully proved.)

*Dr. Simpson*, for General Guise.—It does not appear when or where the paper No. 1 was wrote; none of the witnesses have seen deceased write more than his name, and therefore they have not made a sufficient proof of the handwriting of will No. 1; no recognition of that paper.

(a) *Conyngham v. Smith*, Deleg., 24th May, 1750. The Judges Delegates present at the sentence were,—Mr. Justice Burnett, Mr. Justice Denison, Dr. Chapman, Dr. Salusbury, and Dr. Jenner.

Robothon, indeed, says she has heard deceased say, both before and after he was of age, he would make a will in favour of Assaily. Deceased locked up No. 2, which shows he considered that as a paper which was to be finished; No. 2 appears to be wrote subsequent to No. 1, by deceased desiring the day he died his father to give plate to Miss Hervart, which the General could do by No. 2, but he could not by No. 1, for by that paper all that was given to him was only for life.

*Dr. Bettesworth*, same side.—No proof that this paper, No. 1, is the act of deceased. Swinb. part 7, sect. 13; imperfect papers depend on circumstances.

JUDGMENT.

Sir GEORGE LEE.

It not appearing how long before deceased's death No. 1 was wrote, nor where it was found, and it being very imperfect, and no evidence that deceased intended it should operate as his will, on the contrary, he having declined to carry No. 2 into execution, which was wrote on the same plan, and having on the day of his death desired his father to give specific legacies to certain persons, I gave sentence against the schedule No. 1, so far as related to Hervart, who propounded the will, and pronounced the deceased to have died intestate; and continued the cause to the next term as to the non comparentes, but did not give costs; and on the first session of Michaelmas Term, 1752, it appearing that a citation was taken out against the non-appearers, and was personally served on those in England, and by public edict against those abroad, and no appeal having been interposed by Hervart, I, upon motion, extended the interlocutory sentence, given against Hervart on 28th July 1752, to the parties not appearing, and confirmed said decree against them.

BAKER against RUSSELL.—p. 167.

An administration revoked on the production of a will.

GEORGE RUSSELL died in March, 1752, he made his will, and appointed Robert Baker executor; Thomas Russell, deceased's father, took administration to him as dying intestate, and described himself of Chancery-Lane. The executor took out citation against the father to bring in the administration; the father could not be found where he described himself to live, and therefore could not be personally served; the executor took out a citation viis et modis against him, and advertised him but could not hear of him. The executor made affidavit of the above facts, whereupon I revoked the administration, and gave 4*l.* 6*s.* 8*d.* costs, there being a citation viis et modis and an affidavit in this case.

HURRELL against HURRELL.—p. 168.

Administration of a nuncupative will, decreed to one of the principal legatees.



## GRANT v. ATKINSON.—p. 168.

A suit carried on by the attorney of an executor does not abate on his death, a proxy having been originally exhibited for one of the executors, as well as for the attorney of the executors.

(*In my own Chamber.*)

## THOMAS against DAVIS and Others.—p. 170.

A person who had been party to a prior suit, touching the grant of an administration cum testamento annexo, held to be barred from instituting here proceedings for the purpose of claiming the administration as residuary legatee.

*Dr. Paul*, for Davis and others.—John Thomas made his will 3d May 1743; appointed James Thomas, executor, residuary legatee; deceased cancelled this will by tearing off his name and seal, and afterwards wrote on a separate paper a memorandum in these words: "I cancelled my will the day of May, 1743, notwithstanding that it is my will and purpose that the several legacies therein specified shall stand good and valid, excepting my appointment of my kinsman, James Thomas, as executor; having provided for him otherwise, as also Mr. Thomas Davis, since deceased." After deceased's death, the cancelled will and memorandum were found together in deceased's closet. Mr. Thomas Evans, a trustee, named in the will, took possession of the will and memorandum. In April, 1751, caveats were entered; in July, 1751, James Thomas took out monition against Evans to bring in the will; in September, 1751, Mr. Tyndall, proctor, alleged Davis to be cousin and next of kin to deceased. Cæsar alleged James Thomas to be executor, and residuary legatee. The Court assigned all parties to answer to each other's interest; 1 sess. Easter term, 1752, motion was made for administration with the will annexed to be granted to the next of kin. Mr. Cæsar then declared he had no instructions from his client. The Court decreed administration to the next of kin, in case Thomas did not propound his interest as residuary legatee. By the 3d sess. of that term Thomas did not propound his interest, and on 17th June, 1752, administration cum testamento passed under seal to Davis, the next of kin. In the letters of administration cum testamento, it was recited that deceased had made no executor, or residuary legatee; whereas it is usual in the like cases to recite in the letters of administration, that the pretended residuary legatee had been assigned to propound his interest, but had not done so, and therefore administration cum testamento was granted to the next of kin. 28th July, 1752, Thomas cited the next of kin to bring in the administration cum testamento and to show cause why it should not be revoked as surreptitiously obtained and under false suggestions. There are two points; first, whether James Thomas is by the memorandum residuary legatee. Deceased expressly revokes the appointment of him as executor, because he had provided for him otherwise, which reason extends to revoking the bequest of the residue to him, and if the will operates as to the residue, the cancellation has no effect, for all the other legacies are expressly revived; and if Thomas is residuary legatee, he ought to have administration, cum testamento which is the

same in effect as executor. The second point, is, that Thomas had knowledge of, and was a party to the former proceedings, and had opportunity to propound his interest, but did not, and thereupon the administration was well granted to the next of kin; and being granted to the next of kin, it cannot be revoked, because when an administration is granted according to the statute, the Court never revokes it. Prerog. 21st Feb. 1724, *Knapp against Fellows*. Robert Fellows, batchelor, died intestate; left a father, who died before he took administration to his son; the father made his will, and appointed his daughters residuary legatees, who thereby had the interest in Robert, the deceased's estate; a brother of Robert's took administration to him; the sisters called him to see the administration revoked, on suggestion that the interest in Robert's estate was in them, as residuary legatees to the father, in whom all Robert's estate vested; but the Court refused to revoke the administration, as being well granted under the statute. Prerog. *Lord Chancellor Freeman of Ireland's case*, he left a will which was not found till many years after his death; his widow took administration to him as dying intestate, and then she died, leaving effects unadministered, administration de bonis was then granted to Mary Edwards, a married daughter of Chancellor Freeman's; her brother cited her to see the administration de bonis revoked, and suggested for cause of revocation, that she had received from deceased's estate by advancement, in his life, more than her share would amount to, and he gave in an allegation to prove that fact; but the Court rejected the allegation, because the administration de bonis was well granted to the next of kin; this administration cum testamento, was granted in foro contradictorio.

*Dr. Hay*, same side.—The cause began by a monition taken out by Thomas, on 26th July, 1751, against Evans, to bring in the will. Thomas was a party throughout that cause, had opportunity to propound his interest as residuary legatee, but did not; might have appealed from granting the administration to Davis, but did not; it thereby became a res judicata. In September, 1752, Mr. Tyndal appeared to the present citation, under a protest, that the matter was a res judicata, and has continued his protest all along. I shall therefore make that the first point for determination, for if by his being a party in the former cause he is barred from controverting the grant of the administration, it is not material to consider whether he is residuary legatee to deceased or not.

*Dr. Pinfold*, for Thomas.—James Thomas was a near relation to deceased; deceased died 22d April, 1751. James Thomas, then in Ireland, he came to England on deceased's death, entered a caveat, and then went back to Ireland; left a letter of attorney with one Johnson, who neglected his affairs, which was the cause his interest was not propounded. Tyndall never denied Thomas's interest. We have cited the next of kin to show cause why the administration should not be revoked, as surreptitiously obtained, and on false suggestions, because the administration recites that deceased made no executor or residuary legatee, whereas we now undertake to plead and show Thomas is residuary legatee, and as such ought to have the administration cum testamento, and we have an affidavit to show that Thomas gave power to Johnson to take care of his affairs, but he neglected them.

Act dated 4th Sess. Easter Term, 9th May, 1752, read.

Tyndall alleged the appointment of James Thomas as executor and

residuary legatee to deceased, was revoked by deceased, and no proctor for Thomas alleged the contrary.

Act 4th Sess. Mich. Term, 1752, read.

Tyndall appeared under protestation.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion the administration cum testamento was well granted to the next of kin, upon Thomas's not setting forth his interest as residuary legatee, according to the assignation of the Court, and though the recital in the administration was not according to the common course in like cases, as it did not set forth that it was granted to the next of kin, upon Thomas's not propounding his interest; yet I thought that was not material, for the suggestion was not false, because, so far as appeared to the Court, he was not residuary legatee, since time was given him to show that he was, and he had not attempted to do it, and he might have appealed from decreeing the administration; but as he had not, and was clearly a party throughout the former suit, and originally began it, I was of opinion the grant of the administration was a *res judicata*, and that Thomas could not now controvert it, and therefore I rejected his petition, that he might now be at liberty to plead, and show he was residuary legatee in deceased's will; and dismissed the next of kin, but did not give costs.

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(In my Chamber.)

### HARRIS against JONES.—p. 174.

A trust under a will held to have expired, because it had not been filled up according to the direction of the testator.

**Dr. Hay, for Harris.**—John Butterworth, deceased, made his will on 10th April, 1730; gave to his wife all his estate for her life, and gave her power to dispose of one-fourth of it by her will, or otherwise; the remaining three-fourths he gave to Eleazer Edwards, Samuel Stanley, and William Bentley, in trust to subdivide said three-fourths into four equal parts; three-fourths of the said four equal parts he gave to Thomas Jones, husband of deceased's sister Elizabeth, and to deceased's own two sisters, Hannah and Mary, equally to be divided among them, and to hold for their respective lives, and on their or either of their deaths, to go to their issue, and expressed his meaning to be that trustees should take out of the share of Jones and the deceased's two sisters ten pounds yearly, to be divided amongst the three trustees, to continue till the trust is fully discharged; the other fourth part he gives to the trustees, to be distributed as they think proper, paying out of it ten pounds to deceased's nephew, Joseph Atkins, and five guineas to Joseph Pottinger; and then devises in these words: "*And in case it shall happen that either of them (the trustees) shall depart this life during the life of my wife, or before the trusts hereby reposed in them are fully discharged, that the survivors of them shall nominate any other as they shall mutually agree upon, in case the party dying shall not have named one to supply his place, which said person shall, immediately upon taking upon him the burthen of the*

*trusts hereby created, be esteemed as the person so dying, and shall be entitled to a proportionate share of the legacy hereby bequeathed to the trustees."* Deceased made Mary Butterworth, his wife, executrix for her life, and then substituted the three aforesaid trustees, his executors. The wife proved the will, but took no notice of a codicil which bears even date with the will; Samuel Stanley died before deceased's wife, and made no appointment of a successor: Edwards and Bentley, after the wife's death, took probate, and appointed one Dennison in the place of Stanley; Dennison died, and they, in like manner, appointed Peter Davenport, who died without making any appointment. 19 February, 1739, the wife being then dead, Edwards and Bentley took the probate; Edwards, by writing under his hand, appointed William Harris his successor, and Edwards died in January, 1751; Bentley died in May, 1751, without making any appointment. 3rd June, 1751, administration de bonis non, cum testamento was granted to Thomas Jones, one of the three substituted residuary legatees, on suggestion that the trustees had not appointed any successor. 25th August, 1752, Fanshaw brought in the codicil and appointment of William Harris, and took out citation against Jones, to bring in the administration, and to show cause why it should not be granted to Harris, and to exhibit an inventory. The decree was personally served, and returned 14th September, 1752, and continued to the first session of Michaelmas Term, 1752. *Cæsar* appeared for Jones, and denied Harris's interest. We have proved Edwards's appointment of Harris.

*Dr. Pinfold*, for Jones.—Agreed the facts were truly stated by Dr. Hay; insisted that deceased intended always to have three acting trustees; that Harris did not pretend to any right, either upon the death of Edwards or Bentley. The question is, whether the appointment of Harris is agreeable to the will.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion the appointment of Harris was not agreeable to the will; he ought to have been appointed by Edwards and Bentley jointly to act with them in the stead of Stanley, and that then Edwards might regularly have appointed some person to have acted as his successor upon his death, so that there might have been always (pursuant to the intention of the will) three acting trustees; and this appeared to be the testator's meaning, by giving to every new appointed successor a proportionable share of the legacy left to the trustees. But as Harris never had accepted the appointment, either by acting jointly with Edwards and Bentley, or after Edwards's death by acting with Bentley as successor to Edwards, I was of opinion that the trust had not been regularly filled up, and that therefore it expired with Bentley, the last surviving trustee; and therefore I pronounced against Harris's interest, and confirmed the administration cum testamento granted to Jones, but gave no costs.

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### CARDALE against HARVEY and Others.—p. 177.

The Court is not obliged to grant an administration de bonis non to the person having the largest interest in the personal property of the intestate.

WILLIAM RAWLINS died in 1735, a widower, intestate, left two sons,

Thomas and William, and three daughters, Mary who married Harvey, Catherine who married Dennis, and afterwards married William Cardale, clerk, and Ann who married George Bell. In January 1735, administration was granted to all the five children jointly; 9000*l.* of the estate was soon after distributed. Thomas and William Rawlins and Mary Harvey died; Catherine Dennis and Ann Bell the surviving administrators gave letter of attorney to Harvey their brother-in-law, to manage the affairs of the intestate's estates, but he not acting to their liking, they in 1738, appointed one Borlace to manage their said affairs in Harvey's room. Catherine Dennis married Cardale, and she and Ann Bell are since dead, leaving goods unadministered. One of the brothers left two or more children, to whom he by will bequeathed his estate, and made Borlace his executor and testamentary guardian to his children. Cardale took administration to his wife, Catherine, and as such prays administration de bonis non to William Rawlins the intestate in this cause, and George Bell, the husband of Ann Bell, one of deceased's daughters, and administrator to her, joins with him. George Borlace, as testamentary guardian of William Rawlins, grandson to the deceased, and who under his father's will is likewise entitled to a share of the intestate's estate, also prays administration de bonis non, and Harvey, husband and administrator of Mary one of deceased's daughters, joins with him.

*Dr. Pinfold*, counsel for Borlace.—Insisted that the Court must grant it to the grandson's guardian for his use as next of kin to deceased, and relied on the case of (*a*) *Kindleside and Cleaver* in the Delegates, where the judges held, that an administration de bonis non is within the statute of 31 Ed. 3. ch. 11, and must be granted to the next of kin, as well as a simple administration.

#### JUDGMENT.

SIR GEORGE LEE.

But I think that case does not extend to other grants of administration de bonis, for there the case was, that a feme covert died intestate, leaving a daughter, Cleaver, by a former husband; Kindleside, deceased's husband, took administration to her, made his will, and appointed his son, by a former wife, William Kindleside, his executor, and died; William Kindleside took probate of his will, and then prayed administration de bonis of his mother-in-law's estate as having the interest; Cleaver, the daughter of the intestate, likewise prayed it, and the Judge of the Prerogative held, she as next of kin to the intestate was entitled to it, though the interest was in the representative of the husband, and the Delegates were unanimously of the same opinion, but in that case the daughter was next of kin to the mother at the time of the death of the intestate, and if she left choses in action, the property of which the husband had not altered, she also was beneficially entitled to them, though the husband as such by special privilege was entitled to the administration and her other effects; whereas the grandson was not next of kin at the time of the intestate's death, though he was now become so. However as the grandson had an interest in the intestate's estate under his own father's will, and was a lineal descendant of the intestate,

(*a*) *Kindleside v. Cleaver*, Deleg. 1st July 1748. Delegates: Mr. Justice Wright, Mr. Justice Birch, Drs. Walker, Simpson, Pinfold, Junr., Chapman, and Collier.—This appeal was from a decision of Dr. Bettesworth, Prerog. 1745. See 1 Hagg. E. R. 345.

and now at the time of granting the administration de bonis was the intestate's next of kin, I decreed the administration de bonis to George Borlace, the guardian of the minor grandson, and for his use, notwithstanding Cardale had somewhat a greater interest, and I think the administration de bonis non is well granted, because wherever it is granted to one, who at the time of the grant is next of kin, it is granted agreeably to the statute, and therefore is legally granted, and in this case the grandson had an interest in the intestate's estate, and though it is a good general rule to grant administration to the largest interest, yet that is only introduced by practice, not by any positive law, and the Court is not obliged to grant it to the largest interest. I did not give costs.

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(In my Chambers.)

### SEEMAN against SEEMAN.—p. 180.

Not necessary that a testator should be in his senses at the time alterations are made in his will provided he was so when he directed the alterations.

*Dr. Pinfold*, for Magdalen Seeman.—Isaac Seeman died 4th April, 1751, at a quarter past seven in the evening. He had made his will on 6th August, 1735, executed and attested by three witnesses, and he had appointed his wife sole executrix and residuary legatee; he gave several legacies to his relations, amongst them a legacy of one hundred guineas to his sister, Magdalen Seeman, my client. Almost all the legacies now appeared to be obliterated, and particularly that of one hundred guineas to his sister Magdalen.

*Phillips*, for Magdalen Seeman, entered a caveat against proving the will. *Hughes* appeared for Elizabeth Seeman, the widow, and gave an affidavit of scripts and scrolls. *Hughes* denied Magdalen's interest; she gave an allegation propounding it, and has examined one witness to show that the obliterations were not made till after the deceased was dead. *Hughes*, for the widow, has given an allegation to prove the contrary, and has examined two witnesses. It is proved that the deceased declared affection for his wife, and that he would strike out the legacies in her favour, but he did nothing till the day he died; he then called for his will, and ordered his wife to strike them out, but she would not; he then sent for his apothecary, Badon, and one Caton, a neighbour, who says the deceased was dying when he came in, and that Miss Johnstone, the widow's niece, struck out the legacies after the deceased was dead; it is certain the will was not read to the deceased after the obliterations were made. The question will be, whether the obliterations were made before or after the deceased was dead.

*Dr. Hay*, contra, for Elizabeth Seeman, the widow.—The deceased died at a quarter past seven in the evening of 4th April, 1751. His circumstances had decreased, and therefore he intended for the benefit of his widow, to leave out the legacies. About six in the evening on which he died, he expressed great uneasiness that his will was not altered, and desired his wife to do it, but she would not, because there were not witnesses present; the deceased then ordered his maid to fetch Mr. Badon, his apothecary, and Mr. Caton, a neighbour, to be witnesses; when

Caton came in, the deceased said to him, "I am full in my senses;" immediately after Caton came in the legacies were struck out by Miss Johnstone and the widow together; the deceased died soon after, and Miss Johnstone left off as soon as Caton or somebody in the room said the deceased was dead.

Witness for Magdalen Seeman.

George Caton.—"The deponent had no acquaintance with the deceased; only knew him by sight, but the day he died, the deponent was sent for to go to his house; he went into the deceased's chamber; he was then dying, and, as the deponent believes, entirely insensible; the widow was then in the room; a paper, which he believes was the deceased's will, lay on a table in the said room, and was then fair, and without any obliterations as the deponent saw; after he had been in the room three or four minutes, somebody said the deceased was dead, and thereupon Miss Johnstone, niece to the widow, made several scratches on the will with a pen and ink, and then the widow did the same; and she then offered to read the will to the deponent, but he refused to hear it; the widow then went to the fire to dry the will; the apothecary and several others were then present; the deponent cannot say what legacies were struck out, but verily believes the several legacies now appearing to be obliterated, were so obliterated after it was said the deceased was dead."

Witnesses for the Widow.

Jane Baptist.—The deponent has several times heard the deceased say, some of the legacies should be struck out of his will; she heard him say so within a year of his death; the deceased had a great affection for his wife.

Jane Johnstone.—The producent is the deponent's aunt; the deponent has known the deceased for twelve years before his death, and has frequently heard him say, he had made his wife executrix and residuary legatee; and often said his circumstances grew worse every day. A short time before his death, the deceased said, he would alter his will, and put out the legacies; the deponent told him, she had heard he said so; he replied, "Aye, there is not so much to leave," and said it peevishly. The deceased had a great affection for his wife, and showed it on all occasions; he had had the gout for three weeks before he died. About six in the evening of the day he died, he declared he apprehended his death was near, and ordered his wife to fetch his will, and to put out the legacies; she replied, she could not do it, as there were no witnesses present; but she fetched the will; the deceased seemed very uneasy that his apothecary had not staid, and speaking to his wife, said, "Do you do it, or let Jenny do it, or any body do it," or to that effect; and immediately ordered the maid to send for Mr. Badon, the apothecary, and to go herself to Mr. Caton, a near neighbour and intimate acquaintance of the deceased's, in order, as the deponent apprehended, to be witnesses to his altering his will; the deponent sent the maid for Badon; and went herself for Caton, and met him in the street; he went with the deponent to the deceased's house; the deceased was sitting up in a chair by the bedside, when he ordered his will to be fetched; but afterwards turned himself off the chair on his bed. Caton came into the room with the deponent, and went to the deceased's bed and asked him how he did; he replied, "I am in my full senses." The will then lay on a table, and pen and ink by it; and the deponent, immediately after Caton

came into the room, and before Badon came, struck out several of the legacies, and the producent darkened them by making the scratches broader, but the deponent was in so much hurry, because the deceased was then dying, that she cannot say whether she struck out all the legacies, or whether the producent struck out some. The deceased died about a quarter after seven in the evening; all the legacies were obliterated by the deceased's own hand, and the deceased was sensible till after Caton came in.

1. Int. The obliterations were made in the deceased's room; he was dying while the respondent made them; he was sensible when the respondent began; Caton was in the room all the time while the respondent was making the obliterations; Caton said the deceased was dead, and then the deponent stopt. Caton and Badon both saw what was done; Caton told the respondent she did not know what she was about.

2. Int. None of the obliterations were made before Caton came in; she believes that on Caton's coming in, the producent said that the deceased was dying.

The will was read.

*Dr. Pinfold's* argument for Magdalen.—Caton is entirely disinterested; Johnstone is niece to the producent, and therefore under some bias; Caton and Johnstone widely differ as to the deceased's being sensible. The deceased did not voluntarily speak to Caton, and he says the deceased was, he believes, entirely insensible. It does not appear any body told Caton what was the occasion of his being sent for; Caton says, he had not been in the room above three minutes before somebody said, the deceased was dead; if the deceased was not in his senses, he was the same as dead; *for the alterations must be made in the testator's presence*, and the presence of one who knows not what is doing, is the same as if he was absent.

*Dr. Hay*, for the widow.—The question is, whether the deceased was dead before the alterations were made, not whether he was insensible; if it is not certain that the deceased was dead before the alterations were made, but it is only doubtful whether he was then dead, or alive, the Court will follow the deceased's intentions, which are clearly proved to have been, that the legacies should be struck out, and will decree probate of the will to pass to the widow with these obliterations as they now stand.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion that the deceased's intention to have the legacies struck out was fully proved; and that it was his settled desire to his death; that his intention was founded on good reason, or the decrease of his fortune, and the regard he had for his wife, to whom he could not leave a sufficient maintenance.

I thought the weight of the evidence, both from positive testimony, and from circumstances, was greater in support of the assertion, that he was alive, when the alterations were made in the will, than in support of the contrary assertion; and I agreed with *Dr. Hay*, that if it was doubtful, whether the testator was alive, or not, when the alterations were made, the Court ought to go as far as it could by law, to support the testator's manifest intention.

I likewise thought it was not necessary that the deceased should be in his senses at the instant the alterations were made; it was sufficient



that he was fully in his senses when he directed the alteration to be made, and that they were made in his lifetime; in the case of *Garnet v. Sellars*, (a) Delegates, the only questions were, whether the deceased was in his senses when he gave instructions for his will; and whether the will was reduced into writing before the testator was dead; and the Court being satisfied in those two points, pronounced for the will without inquiring whether he remained in his senses during the time the will was writing.

I further observed, that though Magdalen was the only legatee who prayed that her legacy might be reinstated in the will, yet she had offered no evidence in support of her particular legacy; but her evidence equally extended to reinstating all the other legacies which were struck out; and yet nobody prayed them to be reinstated, and it would be going too far for the Court *ex officio* to order all the legacies to be replaced in the will.

Upon the whole I rejected Magdalen Seeman's petition, and decreed probate to pass to the widow, of the will with the obliterations as they stood: but I did not give costs.

(a) *Garnett v. Sellars*, Deleg. 23d November, 1751. The Judges Delegates present at the sentence were, Mr. Baron Clive, Mr. Justice Birch, Dr. Simpson, Dr. Pinfold, jun., Dr. Collier Dr. Ducarel, and Dr. Drisdale.

This case is again referred to by Sir George Lee in his judgment of *Helyar v. Helyar*, Prerog. Jan. 1754, where the circumstances are given more in detail. One peculiarity, however, which occurred in the cause, is not stated, (nor was it necessary for the point then under consideration that it should be,) viz. that there was a failure of proof as to one clause of the will, as will be seen from the following extract of the sentence as it stands recorded in the Assignment Book of the High Court of Delegates. "The judges pronounced, &c. &c. that the judge from whom the cause is appealed had proceeded wrong in pronouncing for every part of the will, or testamentary schedule, pleaded and propounded on the part of Hughes' client, in the first instance of this cause, and in decreeing probate thereof, for that it did not appear by the proof in this cause that the deceased in this cause gave direction for that clause in said testamentary,\* whereby the said deceased is declared to stand a purchaser for the leasehold estate, late belonging to William Tuffnell, in trust for George Garnett, but that, in all other respects, he had rightly and duly adjudged and decreed. Wherefore the Judges Delegates aforesaid revoked the decree of the judge from whom this cause is appealed, so far as the same pronounced for the said clause containing the declaration of trust as to the estate purchased of the said William Tuffnell; but in all other respects they confirmed the said decree, and decreed probate of the said will, or testamentary schedule, so as aforesaid pleaded and propounded on the part and behalf of the said Hughes' client, in the first instance of this cause, dated 14th April, 1749, to the executor therein named; omitting the said clause containing the declaration of trust as to the estate purchased of the aforesaid William Tuffnell; but gave no costs to either party; and lastly the judges, at the petition of Hughes, decreed a monition for transmitting the said original will or testamentary schedule, bearing date 14th April, 1749.

\* So in the original: doubtless the word "schedule" is omitted.

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(In my Chamber.)

FRANCO and FRANCO against ALVERENZA and DE PINNA.—  
p. 187.

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*Upon a Motion for a Commission of Appraisement.*

Although the Prerogative cannot try a debt, yet it can try whether the affidavit of a debt is sufficient.

A commission of appraisement decreed in the presence of the adverse proctor, without any objection taken on his part, held to be final, although the commission was ordered, not to issue under seal for ten days.

**Dr. Paul**, for Alvarenza and De Pinna.—Daniel De Flores, alias De Prado, deceased, appointed his two daughters, and Abraham and Jacob Franco his executors; the Francos have taken probate; he was at his death indebted to De Pinna, 585*l.* 5*s.* In June 1743, De Pinna was insolvent, and was afterwards discharged on the Insolvent Act of Parliament. Alvarenza, as assignee of De Pinna's effects, prayed a commission of appraisement of De Flores' estate; 6th November 1752, De Pinna's affidavit of said debt being exhibited, the Court decreed commission of appraisement to pass under seal in ten days from that time, and ordered each party to name commissioners; 15th November, 1752, within the ten days, H. Farrant, proctor for the Francos, alleged that De Pinna was indebted to deceased, instead of deceased being indebted to him, and offered to confess sufficient assets; De Pinna's affidavit is full.

**Dr. Hay**, same side.—We have an affidavit of Alvarenza as well as of De Pinna, to prove the debt; the only question is, whether the commission which is decreed, shall go under seal.

**Dr. Simpson**, for Francos.—Caveat being entered and warned on 17th October, 1752, Tyndall appeared for De Pinna, and prayed commission of appraisement.

1 Sess. Mich. 1752, *Crespigny* appeared for Alvarenza, and alleged him to be a creditor to deceased in 585*l.* 5*s.*, and exhibited De Pinna's affidavit in proof of the debt, and prayed the commission before prayed by Tyndall to go under seal. Farrant then in Court, and did not oppose, believing there was a proper affidavit. The affidavit is general; does not set forth cause of debt, and Alvarenza did not say he had not received satisfaction; Francos admitted assets, declared they would not plead plene administravit, and alleged that De Pinna was a debtor to De Flores. *Crespigny* now insists that the decree of the 5th November, was final, and that the commission ought to pass the seal.

8th December 1752, Alvarenza and De Pinna gave in further affidavits. De Pinna swears that at the time of his insolvency, De Flora owed him 585*l.* 5*s.* for which he has had no satisfaction, and Alvarenza swears he believes De Pinna has sworn true. De Pinna was insolvent in June 1743; in February 1744, De Flores swore in Chancery that De Pinna was debtor to him before his insolvency above 1000*l.* upon the balance of an account. 10th November 1741, Lord Chancellor decreed that an account should be taken by a master of what De Pinna owed to De Flores; that suit is still depending, and this pretended debt is upon a matter of an unsettled account. By said decree in Chancery of 10th November, 1741, 200*l.* bank stock was ordered to be transferred by De Pinna to trustees as a security for Flores.

Evidence for Alvarenza.

Act of Court of 17th October, 1752.

Farrant prayed probate; *Crespigny* assigned to set forth Alvarenza's interest; Tyndall for De Pinn alleged him to be a creditor to deceased, and prayed commission of appraisement and monition to show deceased's effects, which the judge decreed, and assigned Tyndall to extract it by first session next term, his client making oath of his debt; probate decreed, undergoing monition, &c. in case De Pinna makes oath of his debt.

1st Session Michaelmas term, 5th Nov. 1752, *Crespigny* alleged Alvarenza to be a creditor in 585*l.* 5*s.* and brought in affidavit of his debt;

commission returnable last session of this term; commissioners to be named in ten days, otherwise to go ex parte; present *Farrant* and *Tyndall*, praying nothing.

2d Session, 5th November, 1752, *Farrant* alleged it does not appear by the affidavit exhibited by *Crespigny*, that deceased was indebted to his client; and therefore that he is not entitled to commission, &c. and prayed to be heard.

*Affidavit for Alvarenza.*

Isaac Lusitano de Pinna sworn 3d November, 1752.—Swears positively that deceased was indebted to him in 58*l*. 5*s*. no part of which he, or as he believes, his assignee, has received.

Offered to read Alvarenza's affidavit, which was made and exhibited since 6th November, 1752, and at same time objected that the affidavits of Francos could not be read, because this Court could not try the validity of the debt; it must be taken upon the affidavit of the creditor, and could not be controverted.

*Dr. Paul*, on that point, cited *Rupert Brown's* case, and *Hughes and Bulkeley (a)*, in the Delegates; there must be a certain sum sworn to;

(a) *Hughes*, I think, is clearly a misnomer, or rather, owing to a clerical error, the name of *Hughes* has been written for that of *Lewis*. Subjoined is an exact transcript of a very valuable note of the case of *Lewis v. Bulkeley*, Deleg. 1732-3, which I have found amongst the MS. papers of Sir George Lee. The internal evidence is such as to leave no doubt but that it is the case alluded to.

Delegates, Serjeants' Inn, Fleet-street, February, 13, 1732-3, coram Judges Page, Probyn, Fortescue, Thompson, Lee; Doctors Tindall, Pinford, Strahan, Audley, Kinaston, Isham, Bramston, Cottrell.

LEWIS et LEWIS contra BULKELEY per CAREM.

This cause began originally in the Consistory Court of Bangor, upon the will of one Mary Williams, alias Hampton, and was appealed from thence to the Arches, where the first sentence was affirmed, and from thence to the Delegates.

In the first instance William Lewis, Esq. was examined as a witness, who, in an interrogatory put to him, deposed that he was a legatee in the said will, in a piece of plate which he had since received, and was worth about eight pounds, and added that, if the will should be set aside he would be entitled to an equal share of the deceased's effects with Ann Lewis, the opponent in this cause. The deposition of this witness was read in the Court at Bangor, but in the Arches it was objected that he had a specific legacy, which, if the will should be set aside, might be recovered again from him by the administrator, and, therefore, he having an interest under the will, could not be a witness to support it. Dr. Bettesworth, dean of the Arches, was of opinion the objection was good, and would not suffer his deposition to be read; and this rejection of him was not appealed from; but afterwards, when the cause was heard in the Delegates, on the 5th December, 1732, (the rejection of this witness not having been entered in the minute book of the Arches Court), the counsel for the will offered to read his deposition there, upon which the counsel for the other side made the same objection to him that had been before made in the Arches; and after much debate, the Court was divided in opinion; to wit, Judge Page, Judge Fortescue, Dr. Tindall, and Dr. Pinford, were of opinion that he was a good witness: Judge Lee, (afterwards Lord Chief Justice Lee, brother to Sir George Lee,) Dr. Audley, Dr. Bramston, and Dr. Cottrell, were of the contrary opinion: whereupon a commission of adjuncts was obtained, and on 13th February, 1732, this point was solemnly argued before the whole commission, as above-named, the majority of whom were of opinion he was a good witness, and that his deposition ought to be read.

It was agreed by all the judges of the common law, that if the will should be set aside, the administrator might recover the legacy by an action of trover, and they seemed to agree that there was no difference between this and a pecuniary legacy, for in that case also, if the will wherein such legacy was devised, was set aside, the legacy might be recovered from a legatee who had received it by an indebitatus assumpsit; so that they seemed to agree that the objection would lie, with regard to their being interested, against all witnesses that were legatees of any sort, unless they renounced their legacies in proper form; but those of the commissioners who were of opinion that he was a good witness, seemed to found their judgment on his answer to the interrogatory, in which Lewis swore he was entitled to share in the distribution under an intestacy, and from thence argued that he could be under no bias, because he must have a better interest to set this will aside, than he could have under an eight pounds legacy to support it. The

May 1748, *Prerog., Smart and Cross v. Mitchell*, Smart and Cross, as creditors, made oath of debt, and prayed commission. Mitchell confessed assets, but Court decreed commission.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion, that if they read Alvarenza's affidavit, the affidavits of the Francos, in answer, ought to be read; for though this Court cannot try the debt, yet it can try whether the affidavit of the debt is a sufficient one; for though De Pinna has sworn to a certain sum, yet if it shall appear from the counter-affidavits that his demand arises upon an unsettled account, his affidavit, according to the settled determinations of this Court, was not sufficient to obtain a commission. But I suggested to the counsel for Alvarenza, that if they read the affidavit of Alvarenza which was made subsequent to 6th November, they would give up thereby their first point, viz., that the decree of the 6th November was final, and consequently that the matter was *res judicata*; which point I thought ought first to be determined, for it would be to no purpose to go into the affidavits if I had already made a final decree which I could not alter; and thereupon that point was argued, and the council for Francos insisted that they were in time to oppose the commission issuing under seal (a); for though it was decreed on 6th November, yet the decree was not complete till it was under seal, and before the ten days given for naming commissioners was expired, they had objected to the affidavit of the debt, and therefore the decree of the Court was not yet final, since the seal was not yet affixed to the commission.

But I was of opinion the decree for a commission of appraisement made on 6th November, in presence of H. Farrant, proctor for Francos, who neither objected to the affidavit or to granting the commission, was final, though the commission was not to pass under seal till ten days after, because the Court was to make no further order thereon; for it was then decreed to pass under seal, and the actually putting the seal to it was a ministerial act of an under officer, in consequence of that decree; that if they had not appealed from the decree, they could not appeal from setting the seal to the commission, no more than a man who has not appealed from a decree of excommunication can appeal from a significavit, which is consequential upon the excommunication; so if the Court pronounces against a will and decrees administration to the next of kin, but orders it not to pass under seal till fifteen days after, if the adverse party neglects to appeal within the fifteen days from that decree, he cannot afterwards appeal from setting the seal to the letters of administration; and in this case, if the decree on 6th November was complete and final, I was *functus officio*, and was not at liberty to consider the affidavits, or any thing that has been done subsequent, and therefore I

Judges who were of the contrary opinion argued that the rule of law, that no person could be a witness where he had an interest, was clear and determined; and that the smallness of the interest did not alter the general rule; that the interest under the will was clear and certain, whereas that under an intestacy was uncertain, there being no constat of the quantum of the estate, nor of the degree he stood in as to distribution, and, therefore, an uncertain interest could not be set in competition with one that was certain.

The Judges who were of opinion that the deposition of Lewis ought to be read, were Judge Page, Judge Fortescue, —Tindall, Pinford, Strahan, Kinaston, Isham, Bramston, Doctors. The judges of the contrary opinion were Judge Probyn, Baron Thompson, Judge Lee, —Audley, Cottrell, Doctors.

In this case I was of counsel: vide my notes. —(MSS. Cases of Sir George Lee.)

(a) A similar point was raised in the case of *West and Smith v. Wilby*, 3 Phill. 379.

rejected Farrant's petition, and ordered the commission of appraisement to pass under seal; but the time for naming commissioners and for the return being elapsed, I allowed ten days *de novo* for naming commissioners on the part of Farrant's clients, and directed the commission to be returnable on the 15th of March, 1753.

Appealed, but my decree was affirmed (a) by the Delegates 25th June 1754, and the cause remitted.

(a) The Judges Delegates present at the sentence were Mr. Justice Foster, Mr. Baron Smythe, Dr. Walker, Dr. Collier, Dr. Smalbroke, and Dr. John Bettesworth.

The minute in which the sentence is embodied shows that a question was raised before the Delegates as to the nature and extent of the appeal; it is as follows:—

"Crespigny alleged that the appeal interposed in this cause did not extend to the acts or decree of the judge from whom this cause is appealed, of the 6th and 15th Nov. 1752, and that the judges were limited to inquire into the act of the judge of the 30th January, 1753. Farrant alleged that the appeal by him interposed did extend to the acts of the 6th and 15th Nov. 1752; and prayed that the judges would inquire into and determine the said acts.

The Judges having heard advocates and counsel and proctors on both sides, were of opinion that the said appeal did not extend to the acts of the 6th and 15th Nov. 1752, and that they were restrained from inquiring into, or determining upon, any other act than that of the 30th January, 1753.

Crespigny and Farrant produced definite sentences in writing which for their respective parties they prayed to be read, signed, and promulged, and given.

The judges ordered the sentence corrected by Crespigny to be read, which was read accordingly, (the clauses which related to costs being first struck out), pronouncing, remitting, declaring, and doing in all things as are therein contained, there being many witnesses present."

### SUDYER and SUYDER against MAN.—p. 195.

A witness produced and examined who had a legacy of a ring under a will, without renouncing or receiving his legacy. Application before publication that his disposition should be suppressed, and that he should renounce his interest and be re-examined, acceded to.

*Dr. Paul*, for Sudyer.—John Sudyer, deceased, has made his will, and appointed James Sudyer, his son, and William Sudyer, his brother, executors, who have propounded the will; Elizabeth Man, deceased's daughter, opposes it. The executors produced and examined Samuel Whitbread as a witness, who has a legacy of a ring in the will, without renouncing or receiving the legacy; he has been cross-examined by Man, but the depositions are not published, nor is the term probatory expired. We pray that his deposition may be suppressed, and that he may be at liberty to renounce or receive his legacy, and may then be re-examined; a witness examined without renouncing, may afterwards renounce and be re-examined. *Prerog. Hill and White*, Lewis Ormsby, a witness, examined to prove General Sannay's will, without renouncing; did afterwards renounce and was re-examined. *Prerog. Hughes and Vozley*, one of the proctors in the cause examined the witnesses; Court suppressed the depositions, and ordered the witnesses to be re-examined.

*Dr. Hay*, for Man, chiefly urged that Whitbread ought not to be re-examined, because he had been cross-examined, and thereby knowing the interrogations, might frame his new deposition accordingly.

JUDGMENT.

Sir GEORGE LEE.

But as the witness was examined only upon a common condidit, I thought there could be no danger of that sort, and ordered the deposition

of Samuel Whitbread to be suppressed, and that he should renounce or be paid his legacy, (see *Cooper v. Derrienic*, 1 Hagg. E. R. 483,) and then should be examined again; and ordered Cheslyn, proctor for Sudyer, to pay 1*l.* 6*s.* 8*d.* to Adderley, proctor for Man, for costs; whereupon Adderley declared he would consent in acts of Court that the present deposition should be read, and that he would not object against the witness at the hearing of the cause as interested; which consent of the proctor was entered in acts of Court; but for the greater security, I directed he should exhibit a proxy from his client, authorising him to give such consent.

## ARCHES COURT OF CANTERBURY.

(*In my Chamber.*)

HARRISON by her Guardian against RHODES.—p. 197.

### *On Admission of a Libel in a Cause of Legacy.*

A legacy held to carry interest from three months after the death of the testator.

MARY RHODES made her will, dated 30th Aug. 1748; appointed Samuel Rhodes, executor, who took probate; she gave a legacy of 100*l.* to Elizabeth Harrison, her niece, a minor, "*to be paid her by my executor within three months after my decease.*" Harrison, is a minor about eight years old. Ann Harrison was appointed guardian to her in June 1752. Deceased died in 1748. The guardian sued for the legacy with interest from the expiration of three months from the deceased's death.

*Dr. Paul*, for Rhodes, the executor—opposed giving interest longer than from the time when the legacy was demanded, and moved that it might be specified in the libel, when it was demanded; said his client was ready to tender the legacy with interest, from that time cited. Precedents in Chancery, 161, *Joliff v. Chew*, legacy shall not carry interest till it is demanded.

*Dr. Hay*, contra, for Harrison.—2 Salkeld, 415. *Snell v. Dee*, (a) if a legacy is devised generally, interest shall be paid to a minor from the end of the year from the testator's death; but a major shall have interest only from his demand; where a legacy is left from a day certain, interest shall accrue from that time.

JUDGMENT.

Sir GEORGE LEE.

I admitted the libel as laid, and declared my opinion that interest was due from the three months after the testator's death, because it was a legacy to a minor and her niece, and because, by limiting a day for

(a) The point decided by Lord Chancellor Cowper, in the case of *Snell v. Dee*, was, that wherever the time is annexed to the legacy itself, and not to the payment of it, it becomes a lapsed legacy, if the legatee dies before the time expires. 2 Salkeld, 415.—See also 1 Brown, 298, and 3 Brown, 473.

payment she had expressly showed her intention that the executor should have advantage of the money only for a short time, while he could collect in the effects, and it must be presumed he has made interest of the money; but as a guardian was appointed but in June last, I thought he was not in mora.

Mr. Cheslyn, proctor for the executor, prayed till next Court to consult with his client, whether he should tender the legacy with interest from the three months; which I granted, and condemned his client in 1*l.* 6*s.* 8*d.* costs for the motion.

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PATTEN against CASTLEMAN.—p. 199.

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*Appeal from the Consistory Court of Bath and Wells upon a Grievance.*

A sentence of excommunication reversed, because it was clear from the process that the party had complied with the order of the Court, for the alleged neglect of which he had been excommunicated.

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HARRY against LITTLETON.—p. 201.

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*(An Appeal from the Consistory Court of Llandaff.)*

If a person has lands in the parish in which he has cattle for the plough and pail, he is not excused from paying tithes for unprofitable cattle depasturing in another parish. The vicar having insisted on a modus for a less sum than he would be entitled to for tithes of common right, it is not necessary for him to prove the modus in the fullest manner.

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PREROGATIVE COURT OF CANTERBURY.

*(In my Chamber.)*

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SUTTON against SMITH and Others.—p. 207.

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*(On a Grant of an Administration pendente lite.)*

An application for an administration pendente lite, rejected, because no special cause for granting it, was set forth.

DR. Hay, for Ashbury Sutton.—Samuel Sutton died in November, 1749; made a will 6th November, 1749, and named Philip Smith executor, who took probate. Deceased left a brother and several nephews and nieces. Ashbury Sutton, one of his nephews, was at Maryland when deceased died; he is since come home, took out process against the executor to bring in the probate, and prove the will by witnesses, &c. Process returned last Michaelmas term. Smith has brought in

the probate, and given in a common conditit, and has examined the four subscribing witnesses. The will is in these words :

" I, Samuel Sutton, citizen and brewer, make this testament relating to my niece, Mrs. Elizabeth Edwards, and do give her five pounds a year for eight years, if she live, to be paid by Mr. Philip Smith, my executor to this will, to be paid on May-day every year.

" SAMUEL SUTTON.

" She shall have no more of my effects.

" Signed, sealed, published, and delivered,

in the presence of us,

Witness, " Elizabeth Sutton,

" John Sutton,

" Joseph Sutton,

" Adam Critch."

Smith has possessed himself of all deceased's effects. The question upon the merits will be, whether the executor has any other interest than for the use of Elizabeth Edwards; the present question now is, whether an administration pendente lite shall be granted. Smith has received several large sums, and several other large sums are now due to deceased's estate. Deceased had an exclusive patent for fourteen years for extracting foul air out of ships by fire, ten years of which are expired; and pending the suit, nobody has a right to use the patent. We propose John Prestwick, of London, merchant, to be administrator, and offer 10,000*l.* security.

*Dr. Paul*, contra.—Probate granted in common form to Smith, who executed the patent. A great deal of money is due from the government; the cause now stands *ex priora*, and may be heard this term; copies of the depositions are delivered to both parties. Administrations pendente lite are never granted but when the estate is perishable, or the cause likely to depend long; deceased left a brother, who was content with the will.

N. B. The motion was made only upon the act of Court, and two or three answers to interrogatories, put to the witnesses on the conditit, were read, but no affidavits (as usual) were exhibited to show the estate was perishable, or that the money in Smith's hands was in danger of being lost.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion that administrations pendente lite ought never to be granted without special cause; and in this case, there being no evidence to support the motion, and the cause being soon to be heard, I rejected the petition for an administration pendente lite.

## ARCHES COURT OF CANTERBURY.

BIRD, alias BELL, against BIRD.—p. 209.

1753. In a suit for nullity of marriage brought by the husband, a *de facto* marriage being admitted, the husband is to bear the expenses of the wife.

BIRD brought a suit against his wife, Bird, alias Bell, for nullity of



marriage, by reason of a former marriage, in the Court of the Commissary of St. Paul. The wife appealed upon a grievance, in admitting certain articles of the husband's libel; and now she prays the Court will decree the husband to pay her a sum of money to pay her expenses in hearing the cause upon the grievance, which the husband opposes, and insists that she is not his lawful wife, and therefore he is not to bear her expenses.

The act of Court sets forth—that it appears from his libel that she and Bird were married together, by license, at the parish church of St. Bennet's Paul's Wharf, on 7th February, 1735, and lived together as husband and wife till 9th October, 1750, when he, without any cause, turned her out of doors without any money; that she has had eight children by him under the said marriage; that her first husband was dead before her second marriage, and that Bird, in order to obtain a license for their marriage, swore her to be a widow. Bird, on the contrary, only alleges that her first husband was alive at the time of his marriage to her, that therefore such marriage was null ab initio, and he is not bound by law to pay her expenses.

Bell made affidavit on 16th February 1753, that Bird turned her out of doors on 9th October 1750, without any money; that she has nothing to pay the expenses of the suit, or to support herself.

*Dr. Paul*, for the wife.—She cannot be admitted to sue as a pauper, because she has a husband who is not a pauper. When he took the license he swore she was a widow. *Clarke's Praxis*, tit. 206, *Oughton's* edit., in suit between husband and wife she is entitled to alimony and costs: they admit a marriage, but object that it is null.

*Dr. Hay*, same side.—It is sufficient for us upon this point to show a marriage de facto; if a woman brings a suit for impotency against her husband, she is to have alimony and costs during the suit, and that is a much stronger case than this; for there the woman who prays the alimony and costs, affirms the marriage was null ab initio; whereas in this case the man affirms and the wife denies it.

*Dr. Pinfold*, contra, for Bird.—At present it is a question, whether there is any marriage at all; for if she had a husband living at that time, the transaction with Bird was not a marriage, but a profanation of marriage. To entitle to alimony and costs, there must be a marriage proved or confessed. No case cited where costs have been allowed to the woman in a cause of this sort; giving her costs is determining against us upon the merits, for it is declaring Bird to be her husband; he swore her to be a widow in the warrant for license upon her information.

#### JUDGMENT.

SIR GEORGE LEE.

I said I had never met with a question of this sort before, and as no case had been cited, I supposed it never had been determined, though it seemed strange to me that it had not; but as there was no precedent, I must determine it upon the (a) general principles of law and reason.

(a) I apprehend that this decision, which seems to have been in a case *primæ impressionis*, has descended to our times with the authority to which it is justly entitled. In all matrimonial cases where a fact of marriage is established, and the parties have not separate incomes, the husband is liable during the progress of the cause to pay for the maintenance of his wife and the costs of the suit. But in a case of gross fraud, it would I presume, be competent to the judge to condemn the asserted wife in costs, at the termination of the suit.

The man by his suit admitted that he was married to her de facto, and it was alleged and not denied that he had lived with her as his wife for many years, and had eight children by her, and under that marriage he had a right jure mariti to possess himself of whatever she had, and must be supposed to have done so, and consequently she could have no money of her own to defend herself against his suit. I must presume till the contrary appeared in evidence, that she was his wife de jure, as well as de facto, for otherwise she must be guilty of bigamy, and is a felon by stat. of Jac. 1 (Stat. 1 Jac. 1. c. 11.); but the law presumes, on the contrary, every body to be innocent till they are proved guilty. I must therefore suppose her at present to be his lawful wife, and as such entitled to have costs, as she prays to defend herself in his suit, and she cannot be admitted a pauper, because she is at this time a married woman and her husband is not a pauper; I therefore decree Bird the husband to pay her 10*l.* for the expenses of hearing the appeal.

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RILER alias RYLER against COZEN.—p. 212.

*Appeal from Norwich on a Grievance.*

The same faith cannot be given to copies as to original deeds. If the Court sometimes orders original deeds to be delivered out, which are wanted for other purposes, it only does so on a registration being made of the instruments, and on an undertaking from the party requiring them that they shall be attended with at the hearing of the cause.

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## PREROGATIVE COURT OF CANTERBURY.

RENAULT alias HERDMAN against SAULNIER.—216.

The forgery of a will not established.

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## ARCHES COURT OF CANTERBURY.

STEPHENS against WEBB.—262.

*Appeal from Hereford in a Grievance.*

An appeal pronounced for, on an understanding that the cause should be retained, and the adverse proctor should declare in acts of Court that he admitted certain points.

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FOOTE against RICHARDS and BARTLETT.—p. 265.

*Appeal from Exeter.*

In a suit under 5 & 6 Ed. 6, c. 4, not necessary that the witnesses should depose that the party proceeded against chided, brawled, and quarrelled; it is sufficient if they prove that words of brawling were used.

## PREROGATIVE COURT OF CANTERBURY.

## LADY MAYO against BROWN.—p. 271.

Where the interest of a daughter, claiming administration to her father, is denied, it will be sufficient if she establishes the marriage of her parents by reputation and cohabitation; but she is bound to show the time and place of her own birth.

## RADCLIFF against VENFIELD.—p. 272.

Costs given against a party who had filed a bill of discovery in the Court of Chancery, then proceeded to call for an inventory in the Ecclesiastical Court; and afterwards abandoning the latter suit, had revived the bill in Chancery.

## JEHEN against JEHEN.—273.

*On fuller Answers.*

Answers objected to and reformed.

## Lady COOKES WINFORD against HELLIER.—p. 274.

A witness who had been examined in chief under a commission, but had been prevented by illness from being examined on interrogatories before the close of the commission, allowed to be reproduced and examined on interrogatories at the expense of the party who produced her.

HELLIER had a commission for examining witnesses in Hertfordshire; several were produced and examined; among others, Sarah Hunkback was produced, sworn and admonished, but she (as it was suggested) being taken ill, went away without being examined. The substitute for Glasier, proctor for Lady Winford, alleged he would examine her on interrogatories, and prayed the commissioners to adjourn, and not close the commission, but they rejected this petition, and closed the commission; and now Glasier prayed that the said witness, Sarah Hunkback, might be brought to be examined on his interrogatories, at the expense of Hellier, who produced her. Bishop, proctor for Hellier, did not object to her being brought to be examined on Glasier's interrogatories, but insisted she ought to be brought at the expense of Glasier's client, and not at the expense of his client, and at whose expense she should be brought, was the question now before me.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion the witness ought to be brought to be examined on Glasier's interrogatories, by Hellier, the party who produced her, and at his expense, and said, though I did not remember any case where it had been adjudged; yet I took that to be the constant practice, and the registrar and practisers agreed it was so. I accordingly decreed the

witness to be brought to be examined on Glasier's interrogatories, at the expense of Bishop's client who produced her.

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SUTTON against SMITH and Others.—p. 275.

Where there is no doubt as to the factum of a will which contains no disposition of the residue, the Court of Probate cannot pronounce the deceased to be dead intestate as to the residue.

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HELLIER against HELLIER.—p. 281.

(*On grant of Administration pendente lite.*)

An administration pendente lite granted jointly to the nominees of the parties litigant.

DR. *Pinfold*, for William Hellier.—Robert Hellier, Esquire, deceased, lent 4000*l.* on mortgage of the estate of Edward Phillips and his wife; said Phillips and his wife are dead; the son of said Phillips has contracted to sell the estate, and the purchaser will pay off the mortgage, and notice is given for that purpose, and the title deeds which were in deceased's custody are demanded. The deeds cannot be delivered up, nor the money received, without an administration pendente lite; both sides agree to have an administrator, but differ about the person; Mr. Hellier names Mr. Weston, his wife's brother, and offers 9000*l.* security, and consents the money should be paid into Court, to be laid out in the funds; Mrs. Hellier names Mr. Bennet, a witness in the cause; but at last, administration pendente lite was granted by consent to Mr. Bennet, named by Mrs. Hellier, and to Mr. Damerell, named by Mr. Hellier, who are to give joint security, and the 4000*l.*, when received from the mortgagor, is to be paid to Mr. Stevens, register of the Court, to be laid out in three per cent. annuities, in the names of said register and of the proctor of each party.

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COX against THOMPSON, alias SMITH.—p. 282.

The interest of a father established, but without costs.

DR. *Bettesworth*, for Thompson.—Elizabeth Street, widow, deceased; John Cox has set up a will of her's, dated 27th January, 1752; it is opposed by Thompson, the deceased's father. Cox denied his interest; he has pleaded and fully proved himself to be deceased's father. We pray you will pronounce for our interest, and will give full costs to the time Cox was admitted a pauper.

Dr. *Hay*, contra, for Cox.—Thompson, alias Smith, entered caveat by name of Thompson. Cox warned it. *Bellas* appeared for Thompson, and alleged his interest as father to deceased, and prayed an answer, and declared he opposed the will. Cox denied his interest, and offered to propound the will, and to admit Thompson to be a contradictor, and Thompson to bring in scripts and scrolls. He brought a paper in these words:

"I, Elizabeth Street, revoke all wills by me made. Witness my hand, 29th April, 1752;" which he has since pleaded as a revocation. His interest stands thus, John Smith and Ann Carder married at Ramsgate in 1713, and lived there publicly as husband and wife till 1718, then Smith left his wife and lived at Uxbridge, where he took the name of Thompson; the wife went to her father's at Canterbury, and in March, 1718, was delivered there of a daughter, by said John Smith, who was the deceased in this cause. The marriage of Smith and Carder is not proved by any witness who was present thereat, but an extract from the Ramsgate Register, and cohabitation, are proved, and also an extract from the register at Canterbury of the baptism of the daughter is proved, wherein she is mentioned only as the daughter of John Smith. Proved that it was reported in 1718 that Smith was dead; afterwards in 1728, Carder and her daughter came to live with him at Uxbridge; he then pretended he was just married to her, that she was a widow, and had said daughter by a former husband. In the will propounded there is a legacy to deceased's father, John Thompson. We admit they have proved Thompson's interest as father, but they have not affected Cox with the knowledge that Thompson was father, and therefore he is not liable to pay costs; and if the Court should condemn him in costs, as he is a pauper, he has nothing to pay.

*Dr. Beltesworth* admitted they had not affected Cox with the knowledge of the several facts above stated; and therefore, upon the admission of the counsel on both sides, I pronounced for Thompson's interest, but gave no costs.

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### JODRELL against CROP.—p. 284.

A codicil not admitted to probate for want of sufficient legal proof.

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### LOVETT against HARKNESS.—p. 332.

The executor of a latter will put upon proof by the executor of a former will. Latter will established—no costs.

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### BOND against BOND.—p. 333.

Administration contested between a son, and an asserted wife. Administration pendente lite, given to: he nominee of the son in preference to the nominee of the wife, because his interest was certain, and that of the wife uncertain.

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### BOSWORTH, by his Guardian, against CRADOCK.—p. 337.

Affidavits in causes always made before surrogates or commissioners appointed by the Court; whereas affidavits of debts, of the service of processes, &c. may be made before masters extraordinary in Chancery or justices of the peace.

## JUDGER and JUDGER against MANN.—p. 338.

Importunity not established.

*Dr. Paul* for Judger.—John Judger, brewer, made his will, 28th April 1752; made his son, James, and brother, William Judger, his executors, and left the residue to his son, James. Jane Mann, the deceased's daughter, opposes the will. We have examined three witnesses. Mann has not pleaded.

Witnesses for Judger.

1. Samuel Whitbread. The deceased was the deponent's servant nine years; he died in May 1752; the deponent went to see the deceased in his illness, and advised him to make his will; deceased was willing; William Shield took instructions for deceased's will in deponent's presence, and then Shield drew the will pleaded; it was read to the deceased, and he approved it in presence of the deponent, the said Shield, and Eliza Hebden, and duly executed it; and Shield and Hebden attested it; the deceased of sound mind, &c.

2. William Shield.—Will made at Islington where the deceased lodged; deponent did not know the deceased; never saw him before, but Whitbread, whom deponent knew, called him Judger; says the instructions were made out of a paper Whitbread brought, and which deceased approved; deponent drew the will pleaded from the said instructions; read the will to deceased; he approved and executed it in the presence of Hebden and deponent who attested it, and of Whitbread; deceased of sound mind, &c.

3. Elizabeth Hebden.—Deponent was servant to the deceased for six years, and to his death; proves execution of will, and publication; deponent and Shield attested it; deceased of sound mind.

3. Int. Deceased made a will ten or eleven days before his death, and left his effects equally among his children; deponent was a witness to it.

4. Int. Deceased had a regard for his daughter Mann; and she was with him in his illness till she lay in.

*Dr. Hay*, for Mann.—Insisted that as he had made a will equally in favour of his daughter so few days before his death, and as the instructions for the last will were brought by Whitbread without any notice from the deceased, and as the witnesses too came by order of Whitbread, and the deceased was then very near death, the last will must be presumed to have been made by importunity, or a weak head, and therefore was not good.

JUDGMENT.

SIR GEORGE LEE.

But as the former will did not appear, and the witnesses proved the deceased's approbation, execution, and capacity, I pronounced for the will pleaded.

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WINGFIELD against WINGFIELD.—p. 340.

An administration decreed to a widow under a caveat, not to be stopped from passing the seal by a second caveat.

*Dr. Pinfold*, for the widow.—Timothy Wingfield died intestate in Feb. 1753; left a widow and several children. Caveat entered in the name of Thomas Johnson, of Cheslyn; the widow waived it; Cheslyn appeared for Nathaniel Wingfield, alleged him to be a creditor, and prayed an inventory; the court decreed an inventory, he making affidavit of his debt, otherwise the administration to pass to the widow; he did not make an affidavit, but entered another caveat, which stopped the administration passing under seal, and then Southgate appeared for the same Nathaniel Wingfield, and alleged he was brother to the deceased, and denied the widow's marriage to the deceased.

We insist he cannot do it again upon this second caveat, and that the administration is decreed absolutely to the widow.

*Dr. Collier*, for Nathaniel Wingfield.—Insisted that his client had an interest both as a brother and a creditor; that his right as a creditor only was determined under the first caveat, and that he must set forth his other interest as brother under this caveat, and put the widow upon proof of his marriage.

JUDGMENT.

SIR GEORGE LEE.

But I was of opinion, the administration was decreed absolutely to the widow under the first caveat upon Nathaniel's not making affidavit of his debt, and ordered letters of administration to pass under seal to the widow; especially as the brother was not without remedy, for he might if he thought proper call in the administration by process, and put the widow on proving her marriage; and declared I should discountenance that practice of entering caveats merely to stop the decrees of the court from being carried into execution.

### THOMAS against BAKER.—p. 341.

The executrix of an executor entitled to an administration cum testamento annexo, in preference to the widow of the original testator.

JAMES THOMAS, deceased, made his will 27th March 1751, gave all his estate to John Baker, his heirs, executors, administrators, and assigns, in trust to pay himself his debt and the charges of the deceased's funeral, &c., and gave the remainder to his (deceased's) wife, and directs that if his wife should die before his prize-money is recovered, all his effects in that case should go to the said Baker, and made him sole executor. The deceased was a seamen of the Prince Frederick, Privateer. Baker took probate, made his will and appointed his wife sole executrix, and died; she proved his will. Cheslyn, proctor for Thomas, took process against Mrs. Baker, to show cause why administration cum testamento should not be granted to Thomas' widow.

Will read.

*Dr. Jenner*, for Thomas.—Insisted the privity was not continued to Mrs. Baker; her husband was only executor for a special purpose to pay himself his debt, and pay over the residue to deceased's widow; the deceased never intended him a benefit, unless the contingency happened of the prize-money not being recovered in the wife's life time. Stat. Ed.

3, (a) made the executor of an executor suable. A special trust to sell an estate shall not go to the executor of the trustee, Wentworth's Office of Executors. (b)

JUDGMENT.

SIR GEORGE LEE.

It did not appear that the prize-money was paid, and the testator gave his estate in trust to Baker, his heirs, executors, administrators, and assigns.

I did not see any reason to take this case out of the common course, and therefore decreed the administration with the will annexed of James Thomas, to Mrs. Baker, the executrix of the deceased's executor.

FREEMAN against FREEMAN.—p. 343.

A nuncupative will established.

WILLIAM FREEMAN, made a nuncupative will, 20th December, 1751; the deceased was a wagoner; on the road on the 19th December, 1751, he fell under his wagon, and was so much hurt, that he died the next day; gave all to his wife, but did not name her executrix; the nuncupative will was opposed by the deceased's nephews and heirs, who were his next of kin. Three witnesses were examined.

1. Sarah Heath, ex. 9th June, 1752.—Deceased a stranger to the deponent, but believes he was William Freeman, the deceased in this cause; he was brought to deponent's father-in-law's house, a public house at Stapleford, on 19th December, and he died about ten on the morning of the 20th December; between eight and nine that morning, deceased's wife asked him who he would leave his effects to; he took her by the hand and said, "To you, my dear," and bid the deponent take notice he was of sound mind.

The nuncupation was reduced to writing, and signed by the witnesses on the 7th Jan. 1752.

2. Int. Deceased died of the hurt he received by his wagon, which broke his leg.

(a) By the 13 Edw. 1. st. 1, c. 23, executors shall have a writ of account, and the like action and process in the same, as the testator might have had. And by 4 Edw. 3, c. 7, executors for a trespass done to their testators, as of the goods of their testators carried away in their life, shall have action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life. And by the 25 Edw. 3, st. 5, c. 5, executors of executors shall have actions of debts, accounts, and goods carried away, of the first testators, and execution of statutes merchants, and recognizances made to the first testator, in the same manner as the first testator should have had if he were in life, and on the other hand, this statute provides that executors of executors shall answer to others for as much as they have recovered of the goods of the first testator, as the first executors would do if they were in full life; and the 19 Car. 2, c. 3, enacts, that where any judgment after a verdict shall be had by or in the name of any executor or administrator, an administrator de bonis non may sue forth a scire facias and take execution upon such judgment.

(b) Since that statute (13 Edw. 3,) and at this day, where by a will a special trust is recommended to an executor, as to sell land, &c. this not performed in his lifetime shall not be performable by his executor, contrariwise of an interest, as to take the profits of lands for certain years towards the payment of debts and legacies.

So as now in all cases except of special trust or authority without the office of executorship, the executor of an executor, how far soever in degree remote, stands as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor. Wentw. O. E. part 2, c. 20.



2. Reginald Heate, ex. 9th June, 1752.—Agrees with the former witness; deponent a stranger to the deceased; deposes to presence of Mary and Sarah Heath and himself at the nuncupation.

3. Mary Heath, ex. 9th June, 1752.—Deceased a stranger to the deponent; deposes the same as the other witnesses; proves the presence of herself, and of Sarah and Reginald Heath, at the time of the nuncupation.

No opposition at the hearing.

JUDGMENT.

SIR GEORGE LEE. (a)

I decreed for the nuncupative will, and granted administration with the will annexed, to the deceased's widow.

(a) *Bennett v. Jackson*, 2 Phill. 190; *Parsons v. Miller*, 2 Phill. 194.

### TAYLOR and AUSTIN against COX.—p. 344.

A will and codicil propounded by the executors in a common condidit, the next of kin, by special proxy, admits the allegation modo et forma.

### BIRD, alias BELL, v. BIRD.—p. 345.

*An Appeal from the Commissary of St. Paul's on a Grievance, in admitting certain articles of a Libel.* 366.

An exhibit which might have been pleaded to establish identity cannot be pleaded as evidence.

### PRENTICE against FARRAND.—p. 347.

Objections to an inventory must be pleaded in an allegation.

### LEGGATT against LEGGATT.—p. 348.

An application for a joint administration refused.

Dr. *Hay*, for Abraham Leggatt.—Andrew Leggatt, widower, died intestate, left a son Abraham, and a daughter, Elizabeth Leggatt, a married woman. Abraham, the son, prays administration; no objection to him; but Phillips, for the daughter, prays she may be joined in the administration.

Dr. *Pinfold*, for Elizabeth Leggatt.—In 1720, a settlement was made by Abraham Leggatt, grandfather to the parties, of the leasehold lands and premises to himself for life, then to his wife for life, if she remained a widow; then to Andrew his son for life, and to his wife Elizabeth, and and the survivor of them, and the executors, administrators, and assigns of such survivor. If the daughter is not an administratrix, it is a doubt

at law upon the settlement, whether she will not be deprived of her interest in the leasehold lands.

JUDGMENT.

SIR GEORGE LEE.

I was clearly of opinion, that as Andrew had survived his wife, the leasehold estate vested absolutely in him, that he might have disposed of it, and as he was dead intestate, it was subject to distribution, and whether the daughter was administratrix or not, her interest would be the same.

I therefore pursued the general rule, and decreed the administration to the son alone (*a*), but directed it should not go under seal till after fifteen days.

(*a*) The court prefers, *cæteris paribus*, a sole to a joint administration, because it is infinitely better for the estate. *Earl of Warwick v. Greville*, 1 Phill. 126.

### MURPHY against MASON and FENNEL.—p. 349.

Probate of a will revoked, on failure of proof of the identity of a testator.

WILLIAM MURPHY, deceased. Mason took probate as executor of a will dated in 1744. Catharine Murphy, the deceased's sister called him to prove the will by witnesses. Probate brought in in 1751. Murphy's interest confessed in 1752. Will propounded by Mason. Cause concluded in Easter Term, 1752. The witnesses, all strangers to the deceased, could not prove his identity.

JUDGMENT.

SIR GEORGE LEE.

I pronounced against the will, for want of proof of the identity of the testator; revoked the probate, and decreed administration to the sister, and condemned Mason in costs.

### ARCHES COURT OF CANTERBURY.

441. BARTON against ASHTON and GRAY.—p. 350.

(*An Appeal from Lincoln.*)

A proceeding against a parish clerk for deprivation, ought to be plenary, and by articles. If a parish clerk is nominated by the parishioners he is a temporal officer; whereas if he is nominated by the incumbent, he is a spiritual officer.

### PREROGATIVE COURT OF CANTERBURY.

BOND against BOND.—p. 354.

Objections to an administration pendente lite, sustained.

Dr. Pinfold, for William Bond.—John Bond, the deceased, died 5th

Nov. 1752, intestate; we say he died a widower, and left William Bond his only child.

Sarah Southerne claims to be the deceased's widow, and took administration in the prebendal jurisdiction of Colwich, and on 13th Nov. 1752, alleged that the deceased had been dead fourteen days, and administration was revoked for want of jurisdiction, the son's interest was admitted, and Sarah's was denied, and she has pleaded it; the son's interest being certain and Sarah's doubtful, the Court, on 15th March last, (*vide supra*, p. 371,) granted administration pendente lite to William Barnes, named by the son. We mistook Barnes' Christian name, for his true name is Thomas; *Smith* appeared and alleged this mistake. *Fanshaw*, for Sarah, now objects to Thomas Barnes, that he is poor, has not a domicile of his own, but lives with his father who is aged.

Read act of court, dated 17th May, 1753. *Smith* alleged the mistake in Barnes's name, and prayed administration to be granted to Thomas Barnes, giving 2000*l.* security as ordered before. *Fanshaw* alleged that Barnes is brother to William Bond's wife; is a lodger with his father, and is in low circumstances and bears but an indifferent character; that the deceased's personal estate is 1700*l.* as appears by inventory given in since 15th March last. *Smith* alleged that Thomas Barnes lives with his father to assist him, and that he has served in his own right the offices of constable and collector of window-tax in the parish where he lives, and is in good circumstances, and is a parishioner of his parish. Barnes offers undeniable security in such sum as the court shall order.

Affidavits for Sarah.

1. John Stytych and John Mott.—Both well acquainted with Thomas Barnes; he is brother to Elizabeth, William Bond's wife, lives with his father who rents a farm of 40*l.* a year only; rents nothing himself, and is in indifferent circumstances; Stytych swears John Barnes, the father, is rated for the farm, and Thomas has no settled abode, and has but an indifferent character; deponents believe he is set up only to distress Sarah Bond.

2. John Dunne.—Gives John Stytych a good character.

Affidavits for William Bond.

Thomas Barnes, Edward Hugh, Henry Kent, Thomas Atterby, and Thomas Weaver.

Thomas Barnes says, his father is between sixty and seventy years old, and has three children, Elizabeth, John, and deponent; the deponent lives with him, and has the care of his affairs. In 1750 and 1751, the deponent was constable and collector of the window tax in his own right; has more than sufficient to pay his debts, and has some money at interest, and will render a true account of his administration without favour to any one.

The others say, that John Barnes, the father, bears a good character, is esteemed an honest man and of good substance; they have known Thomas Barnes sixteen years; he is a parishioner, and bears a very honest character, and is a man of good substance, and fit to be entrusted with the administration, &c.

*Dr. Simpson*, for Sarah.—We insist she is widow to deceased, and has six children by him; the Court will take care the administration is granted to a proper person of substance, &c. Thomas has not a settled abode; rents nothing himself; is not rated in the books; all the witnesses

to Thomas Barnes's character live in London, and he lives in Staffordshire.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion, the objections against Thomas Barnes were material; that he was not a proper person to be the administrator, and decreed that William Bond should name for administrator pendente lite some person indifferent between the parties, who is a housekeeper and a man of substance, and that security should be given in double the value of the estate.

DRUMMOND, attorney of OGILVIE v. HAMILTON.—p. 357.

A fraudulent administration revoked.

GARDINER against JOHNSTON and Others.—p. 358.

The latter of two wills established.

Dr. Hay, for Catherine Gardiner.—William Johnston deceased, died 5th August, 1751, left a widow, Ann Johnston, and Catherine Gardiner, a niece by a brother, and Robert and Mary Johnston, a nephew and niece by another brother, his next of kin; will dated 2d August, 1751; executed 3d August; contents of the will, to his wife 15*l.* payable eight days after his death, and an annuity of 60*l.* quarterly; and 20*l.* to Mary Johnston, his niece; and 10*l.* to his nephew Robert; and one shilling to William, the son of Robert; and 5*l.* to Ann Edwards, his servant; residue to his niece, Catherine Gardiner, and appointed her sole executrix. Will executed in presence of three witnesses; John Wilson, mayor of Lincoln, John Durand and Charles Mackinnon.

The deceased was a Scotchman, a soldier, pedlar, an hardware man, then a linen draper, and died a farmer; he had no children living, sent for his brother's children to live with him, and particularly Catherine Gardiner, whom he educated, and gave her a fortune of 500*l.* in marriage to Edward Gardiner. On the 2d August, 1751, deceased gave instructions to Edward Gardiner, the husband to Catherine, for making his will, who carried them to Mr. Peart, an attorney, who drew the will from them. The will is opposed by the widow and nephew Robert, who have propounded a former will, dated 18th Nov. 1743; therein he gives all his real and leasehold estates to his wife for life, and his plate and furniture absolutely, and gives the reversion of his said estates and all the residue equally between his nephew and nieces, and appoints two executors in trust, who have renounced. We admit the factum of the will, but say it was cancelled by the deceased and is revoked by our will. The deceased perused and corrected our will, and ordered it to be carried to Mr. Atkinson, a counsel, who made an interlineation: the widow was present at the execution of the last will; the deceased ordered the legacy of 5*l.* to his maid-servant to be read over twice to him, deceased could not find his spectacles, and tried other people's, but they would not do; he attempted to write his name, was so weak he could not make his

mark; the widow alleges incapacity; but his physician and apothecary swear to his capacity; two of the subscribing witnesses speak doubtfully to capacity at the execution; but Wilson, the mayor of Lincoln, swears positively that he was capable; one Robinson swears to deceased's declaration in favour of the widow, but he proves instructions for one will.

*Dr. Jenner*, same side.—Deceased sent for the witnesses; attempted to write his name but could not; deceased fully approved the will, and bid Edward Gardiner write his, the deceased's name, for him, but that being objected to, deceased made his mark, and delivered the paper to Edward Gardiner. On the 3d of August, in the afternoon, the deceased recognised the will to his apothecary. The deceased has two brothers. Catharine Gardiner was the daughter of one of them. William Johnston, the deceased's grand-nephew disobliged him, and he turned him out of his house. Latterly there were quarrels between the deceased and his wife, and nothing is left to Edward Gardiner.

Robinson gives an account of the instructions, and says, eight or ten lines of them were written before he came into the deceased's room.

*Dr. Paul*, for Johnston.—The deceased was an alderman of Lincoln. By the first will the wife was well provided for; the remainder was given equally to his nephews and nieces his next of kin. Gardiner has pleaded that the deceased had two brothers, Andrew and Archibald; that the deceased's father had a good estate, which he left wholly to Archibald, but the contrary is proved. Deceased had 300*l.* fortune with his wife, which set him up; he always declared he would leave her handsomely for her life, and after her death it should go to her next of kin. He fell down his cellar stairs in September 1750, and was much hurt and impaired thereby; and he had another fall, from his horse, in the May following; he then took to drinking, by which he was much weakened in his understanding. Gardiner drank with and encouraged him in drinking, and endeavoured to set him against his wife. Deceased declared he would do no more for Edward Gardiner; had great affection for Robert Johnston and his son William. A week before his death, was incapable of all business. Gardiner has pleaded that deceased, on the second of August, bid Edward Gardiner cancel his will, and carry it with instructions for a new will to Peart. Robinson swears the deceased named his wife executrix. No proof of instructions for the last will. I cannot justify the subscribing witnesses for varying from their act; but they say, they signed the will to prevent worse persons signing it; Wilson declared he once thought to decline signing it. At the time of the execution the deceased fell into a fit. Edward Gardiner guided the deceased's hand to make the mark, and wrote "William Johnston, his mark;" before the mark was made, Edward Gardiner had the first will in his custody.

The cause will turn on the deceased's declarations, and on John Robinson's evidence.

Witnesses for Gardiner.

1. Robert Waterman.—Knew the deceased eighteen years before his death; deponent was journeyman to him; deceased educated Catharine Gardiner, and has heard he gave her 500*l.* fortune when she married.

1. Int. The deceased drank hard latterly. 6. Int. Deceased fell down stairs and from his horse. 8. Int. John Robinson and Davis were intimate with deceased.

2. George Durance.—Has known the deceased about thirty years; heard him say he gave his niece 500*l*.

3. John Wilson.—Has known the deceased thirty years, the same as the last witness, and speaks to the deceased's affection for his niece Catherine; he was not much hurt by his second fall.

4. Joseph Twornby.—In 1750, heard the deceased express a great affection for Catherine, and said he intended to leave a great deal to her.

2. Int. Deceased had a great affection for his wife. 20. Int. The deceased used to cry in discourse.

5. John Johnston.—Knew the deceased twenty years; about three months before his death he fell from his horse, which hurt his health but not his senses; frequently told deponent he would alter his will and make Catherine and her children his executors. In January before his death, he declared so in presence of his wife, and said he would allow his wife only 20*s*. a week.

2. Int. Deceased and his wife lived happily together; never heard any dispute between them but that in January.

6. George Houghton, Gent.—Deponent is an attorney, was employed by deceased; deponent thinks the deceased declined in his senses after his falls; about five or six months before his death, deceased said he would leave Catherine 5 or 6000*l*.; he was then a little fuddled.

5. Int. Was angry with his great-nephew William for sinking a keel of his. 8. Int. Robinson and Davis were intimate with the deceased; he believes he would declare his mind to them.

7. Thomas Foss.—1st April, 1751, at Potterhanger, the deceased, after dinner, expressed great affection for Catherine and her children, and said he would leave all he had to her, except 20*s*. a week to his wife, and he cried; he was then very sensible and sober.

8. Samuel Haslewood.—1st April, deponent was present with deceased and many others, when he made the declaration deposed to by the last witness, with whom he agrees exactly; deceased then sober and sensible.

9. John Spittlehouse.—Well knew the deceased for many years; speaks to affection to Catharine; heard deceased, within a year of his death, say he would leave the biggest part of his effects to her.

10. John Rippindale.—Speaks to declaration on 1st April, 1751, the same as Foss and Hazlewood, and says deceased frequently declared he would leave the biggest part of what he had to Catherine; said he would only leave his wife 20*s*. a week.

20. Int. Deceased said he would not leave to Mr. Gardiner anything; deceased and his wife lived happily together.

11. Thomas Squire.—Agrees with the other witnesses as to declaration on the 1st April, 1751.

12. Thomas Chambers.—The same.

13. Ann Parks.—The same.

14. Richard Town, butcher.—Knew the deceased twenty years; has frequently heard him say he would make Catherine his executor, &c. 30th Sept. 1750, the deceased fell down his cellar-stairs and was much hurt; and in May he fell from his horse, and his health was impaired, but his senses were as good as ever; deponent last saw him on the 18th July before his death, he was then perfectly in his senses; after his second fall the deponent heard the deceased say he would give his wife only 60*l*. a year.

2. Int. Deceased and his wife had frequent quarrels. 3. Int. On the 18th July deceased was perfectly sensible. 5. Int. The deceased turned William Johnston out of his house for sinking the deceased's keel. 8. Int. Robinson, Nowler, and Davis were intimate with the deceased.

15. Mary Slack.—Last saw the deceased on 16th of April 1751, when the deponent paid him rent, and he gave the deponent a receipt wrote by himself; he talked as sensibly as he ever did in his life.

16. Edward Morris.—The deponent paid the deceased money in the spring before his death; his senses good; had affection for Catherine Gardiner.

17. William Gibson.—In the spring before his death, the deceased was sensible.

18. Edward Leatherland.—The deceased kept his books as well as any one could who was not bred to business; entries made therein by the deceased to the 17th July 1751, and they were as regular as the past entries.

19. Richard Town, ironmonger.—About Christmas 1750, the deponent had some discourse with the deceased, and he was then perfectly sensible.

20. Charles Dinmont, M. D.—Deponent knew the deceased from 1745; the deponent visited him as a physician in February 1751; he was then perfectly sensible and capable of making a will; and he saw the deceased twice on the 3d of August, and again on the 4th in the morning; at all which times he was capable of making a will; on the 5th of August, the deponent was with him, and he was then dying.

21. Joshua Peart.—Deponent was acquainted with the deceased in 1739; did business for him as an attorney; kept his books equally regular to his death. On 2d of August, Edward Gardiner came to deponent between eleven and twelve in the morning, and desired the deponent to make a will for the deceased, from instructions he brought, which the deponent did, and gave it to Gardiner, and in the afternoon Gardiner came again, and said the deceased meant only one annuity of 60*l.* to his wife, and 15*l.* in money, and desired the deponent to scratch out one of the 60*l.* annuities, but the deponent wrote the will over again, but the interlineation in the body of the will is not the deponent's hand-writing; and also deponent, by the deceased's order, wrote the 5*l.* legacy to the deceased's maid-servant.

3d Int. Proves the first will; says he saw it uncanceled in Edward Gardiner's hand on 2nd of August, and on the 18th of September, 1751, he saw it cancelled in Gardiner's hand. 4. Int. Gardiner asked the deponent to be a witness to the last will, but deponent refused, because he had not taken the instructions; on 9th March, inst. the deponent declared he had not been a witness, because he had not taken the instructions, and because he heard the deceased was not perfectly in his senses. Int. tertio loco. 3. Int. Believes the deceased could not have been imposed upon in April or May before his death.

N. B. The instructions were given in by this witness, and read as part of his depositions.

22. John Robinson, gent.—The deponent is clerk to counsellor Atkinson; Gardiner came to the deponent's master on the 2d of August, and the deponent, by his said master's order, interlined in the will that the annuity of 60*l.* to his wife was in lieu of dower.

23. John Wilson, Esq. mayor of Lincoln.—Deponent knew the deceased upwards of 15 years; 3d August, Edward Gardiner came to the deponent and desired him to be a witness to the deceased's will; and the deponent, Durance, and Mackinnon went together to the deceased's house; they found the deceased sick in bed, and his wife and Edward Gardiner with him; deponent went to the deceased's bedside and asked him if he knew the deponent, the deceased replied, "Yes, Mr. Wilson, I know you, and I have sent to desire you, and Mr. Durance, and Mr. Mackinnon to be witnesses to my will," or to that effect, and then bid Edward Gardiner read his will, which he did audibly and distinctly, and the deceased was then asked by somebody, whether it was to his mind, deceased said, "Yes;" and ordered that part of the attestation relating to the servant's legacy of 5*l.*, to be read over to him again, and then Gardiner placed a table with pen and ink by the deceased's bedside, and the deceased called for his spectacles, but they could not be found; he attempted to write his name, but could not, and then he bid Gardiner write his name for him, and said, he would make his mark; Gardiner guided the deceased's hand and he set his mark; the deceased was extremely weak in body; he, before, attempted to write his name, and without assistance wrote part of it, which was done in the presence of the deponent and the other witnesses; and being asked by Gardiner whether he delivered that as his will, he moved the paper towards Gardiner and the deceased moved his lips, but the deponent did not hear what he said, and then the witnesses attested it, &c., and then the deceased muttered something about wine, but the deponent could not distinctly hear him; the deponent believes the deceased was very sensible, though very weak in body; the deceased's wife was present all the time and made no other objection than saying, "How can I like it," on being asked how she liked it.

24. John Durance.—Knew the deceased thirty years; 3d. August, Gardiner came to the deponent and said the deceased desired the deponent would be a witness to his will; the deponent, Wilson, and Mackinnon went to the deceased's chamber, where his wife was; the deponent asked the deceased if he knew him, the deceased said, "Yes;" Gardiner read the will distinctly; after which the deceased said, he had like to have forgotten 5*l.* to his maid, and bid him read that part over again, and asked if Mr. Peart had taken notice of it at the bottom; the deceased asked for spectacles, but there were not any that would fit him; he wrote part of his name, but could not go on, and then bid Edward Gardiner write his name, saying; it would do as well, but the deponent objected to it, and then Gardiner wrote "William Johnston, his mark," and then the deceased by Gardiner's guidance, made his mark; and the deceased, being very weak, Gardiner put the will in his hand and said, "You publish this, &c.;" the deceased moved his lips; the deceased was fully in his senses and capable of making his will, and spoke properly; the deceased asked his wife if there was any wine in the house, she said "No," he replied, "You are always backward;" the deceased's wife was present all the said time; deponent asked her if the deceased had consulted her about the will, she said, "No;" deponent asked her if she approved of it, and she said, "How can I?"

16. Int. The deceased said he knew the witnesses. 17. Int. Wilson said he once thought of going out of the room, for he at first thought the deceased was not sensible. 18. Int. Believes the deceased knew the con-



tents of the will, for he ordered part of it to be read over again; the deponent saw the deceased move his lips, but did not hear him publish the will; he thought the deceased was sensible, but cannot be certain.

25. Charles Mackinnon.—Gardiner came to the deponent and said, the deceased desired he would be a witness to his will; says, deceased said he had heard the will read over once or twice; Gardiner read it over distinctly; gives account that the deceased ordered the part relating to the maid to be read over again, which Gardiner did; Gardiner said to the deceased, "You must now sign it;" the deceased said, "Do you sign it," but Gardiner said it would do better for the deceased to sign it himself; the deceased attempted to write his name, but he could not; the deceased bid Gardiner write his name and he would set his mark; Gardiner guided the deceased's hand to set his mark; the deceased took the will and delivered it to Gardiner and said something, which the deponent did not hear; the deponent thinks the deceased was weak in mind as well as body, and not capable of making his will; but believes deceased knew he was making his will; the deponent subscribed as a witness, because if he had refused, he thought somebody might be sent for who could not give so good an account as the deponent.

2. Int. The deponent has seen the deceased sometimes behave ill to his wife. 17. Int. read. Answer; did not hear Wilson declare he had once a mind to go away. 19. Int. The deponent has declared that he did not think the deceased had sufficient capacity to make a will.

26. John Hooton, apothecary.—The deponent knew the deceased fourteen years; the deceased educated Catherine, &c.; expressed great affection for her; in the deceased's last illness the deponent attended him; on the 2d of August deceased was perfectly sensible; deponent gives an account of a discourse with the deceased; on the 3d of August deponent was with the deceased both morning and afternoon; in the afternoon the deceased and his wife talked together about the deceased's will, and she saying, "You have altered, or intend to alter your will;" the deceased replied, "Yes, and not so much to your satisfaction as you may think;" she said, "Where must I live then?" he replied, with some warmth, "At Woolledge's house and be damned;" on the 4th of August the deceased was sensible but very weak; on the 5th of August the deceased was speechless; at all other times he was very sensible, but cannot say whether he was capable of making a will, but believes he was.

27. William Favell.—The deceased did business after his last fall.

Will read.

Witnesses for Johnston.

1. Ann Taylor.—The deponent was servant to the deceased at his death; about six weeks before his death the deponent heard Edward Gardiner say to the deceased, "Sir, Counsellor Beviau sends his service to you and wonders you don't alter your will;" the deponent did not hear deceased's answer; about a fortnight or three weeks after, heard Edward Gardiner say to the deceased, "I beg you will not omit altering your will, for you don't know how soon a change may happen;" the deponent went away and did not hear the answer; the deceased fell from a mare of Gardiner's and was much hurt; the deponent heard him say, he believed Gardiner lent him the mare to break his neck; believes from that time the deceased declined in his senses; he lost his appetite, but drank harder, and Gardiner drank with him till he was fuddled; and at these times the deceased used his wife ill; has heard the deceased

say Gardiner wanted him to alter his will; has heard the deceased express affection for Robert Johnston and his son, and say, he should leave him a part of his estate; the deceased talked of fighting the devil, both when drunk and sober; the deceased drank a bottle of wine and of mead on the morning of 2d August; believes for several months before his death he was incapable of doing business.

4. Int. Deceased was passionate. 5. Int. Deceased drank hard; deceased turned William, his great nephew, out of doors, and said he would leave him nothing. 23. Int. Deponent present on 2d August; when Gardiner took the first will out of deceased's bureau, he called deponent to be present; deceased kept the key of the bureau; believes he gave it to Gardiner to take out the will. 29. Int. Deceased drank strong liquors till two days and a half before he died; never saw him drunk after the Sunday se'nnight before he died; while he kept his bed deponent could not judge whether he was drunk or not.

2. Robert Read.—In January or February 1750, the deceased told the deponent he intended to make William Johnston his heir, and said the same about a fortnight afterwards; the deceased educated the said William in Scotland; Wilson, soon after the execution of the will told the deponent he did not think the deceased sensible, he could not be so; "for my part I would have left the room, but Mackinder said, 'If we do not sign it somebody else will;' and as there had been quarrels between the deceased and me, if I had gone away they would have said it was an ill-natured thing in me."

11. Int. Has heard the deceased forbid William Johnston his house.

3. Eleanor Hunter.—The deponent attended the deceased on the Wednesday, Thursday, Friday, and Saturday nights before his death; the deponent thought him sensible to Thursday morning, when she thought his senses failed him; on Friday night he appeared quite senseless and stamped and asked for his green spatterdashes, though he had none; the same on Saturday; and was both nights incapable of making a will.

4. Robert Fotherby.—A year and a half before deceased died, heard him say he would make William Johnston his heir.

5. Joseph Cap.—About two years before the deceased's death, heard him make the same declaration.

6. Henry Waller.—The deceased cut his head by a fall in September; he drank to excess when Gardiner was with him; deponent has frequently heard Gardiner press the deceased to make his will; deceased answered, "You know I have done handsomely for you hitherto, and I shall remember you;" Gardiner said the deceased's wife had taken an antipathy to him, and if he did not make his will he should have nothing, and said, 50*l.* a year was more than the deceased's wife could spend; the deceased said he should not stint her after such a manner; such conversation always happened when Gardiner was there, and deceased has told the deponent Gardiner was always at him to make a will; deponent once saw the deceased use his wife ill when Gardiner was present, and beat her.

7. William Penny.—About six weeks after the deceased's first fall, the deponent asked him to make his will, and make provision for William Johnston; the deceased said, "I have made provision for his father;" the deponent thinks the deceased was not perfectly sensible.

8. John Baxter.—Proves the first will, dated 18th Nov. 1743.

9. Joshua Peart.—The same. To interrogatories, swears the said first will was uncanceled on 2d August, 1751.

27. Int. The deceased was worth about 6000*l*.

10. Stephen Twelve.—The deceased had above 900*l*. fortune with his wife; after marriage he turned linen draper; his wife did all the work of the house.

11. Elizabeth Robinson.—The deponent is wife to her fellow-witness, John Robinson; deposes to the deceased's affection to his wife, and said she helped to get his fortune, and he would provide handsomely for her; declared he had made his will in his wife's favour; deceased told the deponent, Gardiner endeavoured to set him to alter his will in his favour when he was fuddled; deponent asked him if he intended to do so, he replied he never would do so, for he knew Mr. Gardiner too well to leave his wife in his power; the deceased told the deponent so before his first fall; after his falls the deponent thinks the deceased was not always in his senses; he has told deponent Gardiner had been persuading him to leave his wife only 50*l*. a year, and Gardiner said he must do so; upon the deponent's saying "What would you leave your wife in that manner and have the world say you have left your wife to come to the parish?" he answered, "No, I will not alter my will;" after the deceased's falls the deponent told Gardiner, it was said, he was drinking his uncle to death; he replied, "That the deceased was wrong in his head;" Wilson told the deponent he thought the deceased was not capable of making his will when it was executed.

12. John Durance.—Deponent knew the deceased thirty years; on 3d August, 1751, about two P. M. Gardiner read the will over of *his own accord*; the deceased attempted to sign it, but could not, and bid Gardiner write his name; Gardiner guided his hand to make the mark; when the deponent first went into the deceased's room, he thought the deceased was sensible; but when he executed it, deponent thinks he was not capable of knowing what was said or done; Wilson coming down stairs said, he had once thought of coming away without signing the will.

13. Charles Mackinder.—3d August, 1751, the deceased ordered Gardiner to read the will, and bid Gardiner sign it; the deceased attempted to sign it, but could not; Gardiner held the deceased's hand, and guided it to make the mark; *verily believes during the whole transaction the deceased did not know what he was about*; and deponent signed it only because he thought if he and the other witnesses refused, some other persons would be called in, who might not give so good an account of the affair; Wilson said in deceased's room, "Pray let us go, for I don't care to stay;" deponent said, "We may as well stay, for others will come in our stead."

26. Int. *Verily believes the deceased did not know what he was about, if deponent had been a stranger to deceased he does not know whether he should have thought him incapable, for in the first part of the transaction about reading the will he appeared to be sensible.*

14. Thomas Ball.—About a fortnight after deceased's death, Wilson told deponent, that when he was at deceased's house there was something there he did not like, and wished himself out of the house; deponent has often heard him say so.

15. John Davis.—In 1738, deponent was journeyman to deceased; has heard deceased say his wife was very industrious; had great affection for his wife; expressed great satisfaction in his will made in her favour; after his fall in September, he was much hurt in his understanding, and

after his second fall he grew worse; deponent has seen Gardiner drinking to excess with deceased; deceased told deponent Gardiner had been pressing him to alter his will in his favour, and deceased then said he had done enough for him; believes deceased had great affection for Robert and William Johnston.

8. Int. After his falls, when drunk, deceased talked of fighting the devil.

16. John Robinson, carrier.—Deponent very intimate with deceased above sixteen years; has heard him declare he had got about 7000*l.*, and said it was a good deal owing to his wife; said he would provide handsomely for her; told deponent the contents of his first will, and expressed great satisfaction at having made it; deceased said he told Gardiner the contents of it, and he pressed him to alter it, and leave deceased's wife in his care, but deceased said he knew him too well, and if he was in his senses he would never alter his said will. The deponent has often heard Gardiner press deceased to alter his will and leave his wife only 50*l.* a year, for she had used him ill, deceased replied, "I am satisfied with my will, and will do no more for you, and I think my wife well deserving of what I have left her;" deponent has heard Gardiner endeavour to incense deceased against his wife; has heard deceased declare so after his falls; the last was in May; in May, 1751, about the middle, deceased fell from his horse, and at times talked insensibly; in June or July, 1751, deceased told deponent Gardiner and his wife had been pressing him to alter his will, and give his estate to them, and leave his wife only 50*l.* a year, but he said he would do no more for them; "I declare, if I know what I do, I will never do more for them than I have done;" deposes to deceased's affection to Robert and William Johnston. On 2d August, 1751, between ten and eleven in the morning, deponent was with deceased; Edward Gardiner came into the room, and sat down near the table, where was a paper with about eight or ten lines on it, and then Gardiner began to write under said lines without any previous discourse with deceased; in deponent's presence, and whilst he was writing, deceased said, "Are not you a stupid puppy?" and said he had been writing four or five hours, and he knew not what, and deceased said, "I give my wife 60*l.* a year, to be paid her quarterly, free from all deductions, and I also appoint her whole and sole executrix," and he likewise said he gave his wife 15*l.*, to be paid her some days after his decease, and mentioned some other legacies now in the last will, after which Gardiner read, but not from the beginning of the paper, and read, "I give my wife 60*l.* a year, and appoint her my whole and sole executrix," and then read the other legacies; the names of Edward and Catherine Gardiner were not mentioned either by the deceased or in the reading by Gardiner; there lay a paper on the table, which he believes was the first will; deceased said nothing of approbation; after Gardiner was gone, and deceased's wife was come into the room, deceased said to her and deponent, "Who has got my will?" deponent asked what he called his will, deceased said, "That paper which lay on the table is my will;" and said Gardiner and Peart he supposed were going to cook up a will, and said if Gardiner brought him any paper to sign, he should desire deponent might be sent for to see what it was; deponent never saw deceased afterwards; during part of the time deceased was sensible, other part he appeared not to be so; thinks he was sensible when he talked of Gardiner's cooking up a will, but does not think he had capacity to make a

will. The will pleaded by Catherine is not agreeable to what deponent heard deceased declare, nor to what Gardiner read to him; in the afternoon of the 2d of August, Gardiner told deponent he was going with deceased's will to Counsellor Atkinson; Gardiner encouraged deceased in drinking.

4. Int. Deceased was passionate. 9. Int. Deponent has done business with deceased after his fall in September. 11. Int. Deceased was angry with Johnston for sinking his keel; has heard deceased say, when he was in liquor, he would do handsomely for Gardiner's family. 19. Int. Deponent heard deceased order a legacy of 15*l.* to his wife, and 10*l.* to Robert Johnston. 20. Int. Deceased ordered 60*l.* a year to his wife. 31. Int. Deceased has frequently desired deponent to assist his wife. 32. Int. Deponent has lent money to deceased's widow, and has retained counsel for her.

17. Thomas Parsons.—Knew deceased twenty years; before his death deceased said he intended William Johnston to be his heir.

18. John Westland.—The same.

13th Article of Gardiner's allegation read.

Pleads that deceased ordered Edward Gardiner to destroy his first will, and thereupon he cancelled said will, and then deceased gave Gardiner instructions for the new will, in presence of Robinson who then came into the room; pleads that deceased in Robinson's presence directed Catherine to be made executrix and residuary legatee.

The first will read.

*Dr. Hay's* argument for Gardiner.—The question is only on the validity of the last will, and whether the deceased was capable at the time it was executed. A year before his death he intended to make William Johnston his heir, but afterwards was disobliged by him; had affection for Catherine Gardiner and her children. John Johnston frequently heard deceased say he would leave his estate to Catherine and her children, and 20*s.* a week to his wife. Hooton says about five or six months before deceased's death, he said he would leave Catherine 5 or 6000*l.* and Spittlehouse deposes to same effect. Town, the butcher, says deceased declared he would alter his will.—Capacity,—he made entries regularly in his books to 17th July 1751. *Dr. Dimmock* swears to full capacity on 2d and 3d August and 4th in the morning.—Instructions,—Peart's evidence material; says Gardiner brought the instructions back again, and said there was a mistake in giving the wife 60*l.* a year twice over. Peart and deceased at variance. Gardiner went to Atkinson for his opinion on the will, which he would not have done without orders. Robinson confirms the instructions as to all or most of the legacies.—Execution,—all the witnesses agree deceased knew them, and ordered the will to be read over, and he called for his spectacles, and attempted to write, when he found he could not write his name, he bid Gardiner set his name; he delivered the will after he had set his mark, and asked for wine for the witnesses; his wife present all the time, did not object that he was incapable. Hooton proves a recognition on the 3d of August in the afternoon; if deceased gave instructions, and attempted to execute the will, it was sufficient to make it a good will, and if he had then died it must have been pronounced for. Mackinder swears against his own act. Will ordered to be cancelled, but not then done, because the new one was not made. Gardiner called Taylor to be present when he took the will out of the bureau, and had the key from deceased, which

shows it was his act.—Importunity,—if their witnesses swear true, Gardiner wanted a will in his own favour; this is not so. Robinson's evidence extraordinary; he has accounted for the whole will except the appointment of the executrix and residuary legatee; says deceased said, "Gardiner and Peart are going to cook up a will;" deceased therefore knew Gardiner was going to Peart; wife present at execution, but she did not send for Robinson. Robinson owns he saw Atkinson's opinion, but never offered to come to hinder the execution of the will.

*Dr. Jenner*, same side.—Disputes between deceased and his wife; declaration at Potterhanger was made when he was very sober; he had plainly an intention to vary his will; fully proved that deceased asked if Peart had put in the legacy of 5*l.* to the servant maid; shows he knew Peart drew the will; never could intend his wife to be executrix, for he gives her 15*l.* to be paid to her in eight days, and she could not pay herself; deceased's intention to make his will is clear; the question is only on execution; deceased told the witnesses he had sent for them to be witnesses to his will; he attempted to write his name. Wilson's good character fully proved.

*Dr. Bettesworth*, same side.—Deceased had no children living; was sober when he gave the instructions, for Robinson, who was present, does not intimate any thing to the contrary; the wife could not pay herself the legacy; previous declarations in favour of Catherine; regard to William Johnston before he disobliged deceased; declaration to Hooton is a full recognition of the will of 2d August.

*Dr. Paul*, contra, for Johnston.—Mala fides in Gardiner's plea; Gardiner attempted to incense deceased against his wife; no ill behaviour in the wife to him; declared he would give Gardiner nothing, but by this will he will take all in right of his wife. No will can subsist without instructions, and an animus testandi; no evidence of the instructions; two 60*l.* a year to the widow in the instructions, no evidence deceased intended to give only one 60*l.* a year to her. Cok. 6 Rep. fol. 23, testator must have sane and disposing memory. Moore, 760. *Combe's case*, testator ought to have a discerning judgment. *Prerog. Cave v. Smith*, Dr. Mead, and Mr. Blackstone, the apothecary, visited Mr. Cave in his illness, and swore to incapacity; three witnesses swore to execution of the will, and to capacity at that time; sentence for the will. Wife's behaviour good; revoking a former will requires more judgment than the first making.

*Dr. Pinfold*, same side.—The question is whether there is a sufficient evidence to revoke the first will; his wife had never disobliged him; necessary to consider how the first will became cancelled; pleaded that Gardiner cancelled the first will by deceased's order on 2d August; proved by Peart it was not then cancelled; Gardiner misrepresented William Johnston to deceased; it does not appear Gardiner the niece was with deceased till 1st April, 1751; Edward Gardiner set the deceased against his family; importunity to revoke a former will is illegal; I admit we have not proved total incapacity; there is no evidence of instructions but what arises from Robinson's deposition; Gardiner took away and carried the first will to Peart without deceased's order; Durance and Mackinder have quite destroyed their own credit, and therefore there is but one witness to the execution.

*Dr. Smalbroke*, same side.—Will of 1743 made in full capacity; deceased approved that will in May 1751, and it was uncanceled on 2d

August, 1751; capacity is the only point;—he intended his fortune for his wife, his great nephew, or for Catherine Gardiner, exclusive of her husband. Where there is reason to suspect fraud there must be full proof of capacity.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion the last will was sufficiently proved to be the act of the deceased, and that he had capacity sufficient to do that act, and therefore gave sentence for the will dated 2d August, 1751, but gave no costs.

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Easter Term (a) 1754, the Delegates unanimously confirmed my sentence, and gave 100*l.* costs.

(a) On 29th May, 1754. The Judges Delegates present at the sentence were, Mr. Justice Birch, Mr. Baron Smythe, Dr. Waller, Dr. Simpson, Dr. Ducarell, and Dr. Harris.

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PYTT against FENDALL and JONES.—p. 381.

Question as to regularity of an excommunication.

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HUGHES against COOK and Others.—p. 386.

Creditors are entitled to a constat of the personal estate, but they have no right to litigate the quantum of security, or to require the sureties to justify.

HOWELL WYNNE HUGHES, a distiller and freeman of London, died intate without children, left Ann Hughes his widow. Caveats were entered by Cook and others, creditors; they prayed a commission of appraisement, which was granted and returned; household goods, &c. amounted to between 1100*l.* and 1200*l.*, and good debts (but not received) to upwards of 2771*l.* The widow prayed administration to be granted to her directly; suggested that the estate suffered, and that the creditors were distillers, and were endeavouring to get her husband's customers from her; offered to give security in 4000*l.* for her faithful administration, and the persons named by her were reported by the officer of the court sufficient for that sum; she likewise offered to charge herself with the effects received and in her hands, but not with the debts until they should be received; the creditors opposed the administration passing under seal, and prayed she might first charge herself with the whole inventory, and give security in double the value of the estate, and that the sureties should justify on oath.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion she was not obliged to charge herself with any thing more than had come to her hands; that as the right to the administration was not controverted, I was bound to grant administration to the widow without delay; that creditors were only entitled to a constat of the estate, which they had by the inventory and appraisement, but had no interest in the administration bond, and it had been so determined, and

therefore had no right to litigate the quantum of the security or to require the sureties to justify, and therefore as in this case three parts of the distributable estate would belong to the widow, I thought the security offered was sufficient, and ordered administration to pass under seal to the widow immediately, giving 4000*l.* security.

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## ARCHES COURT OF CANTERBURY.

PATTEN against CASTLEMAN.—p. 387.

The claim of a vicar for a fee on the wedding of one of his parishioners in the church of another parish, not substantiated.

The general principle of law is, that where no service is done, no fee can be due.

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HILLIER against MILLIGAN.—p. 398.

*Appeal from Lincoln.*

Question raised whether the Chancellor of the diocese of Lincoln exercises a concurrent jurisdiction with the Commissary of Buckinghamshire.

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## PREROGATIVE COURT OF CANTERBURY.

CHAMBERLAYNE against DART, calling herself CHAMBERS.—  
p. 401.

In an interest cause, if the time and place of the marriage of an ancestor cannot be set forth, it is necessary to plead cohabitation and reputation.

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JEHEN against JEHEN.—p. 401.

The custom of gavelkind must be pleaded, for it is *lex loci* and not *lex terræ*.

UPON debate of an allegation in which the custom of gavelkind was pleaded, Dr. *Simpson* insisted that it was not a matter of fact to which witnesses could depose, but it was a matter of law, it was *lex loci*, for all the lands in Kent were held in gavelkind, except those that were disgavelled by the statutes of H. 8, and Edw. 6.

JUDGMENT.

SIR GEORGE LEE.

But I was of opinion the custom of gavelkind ought to be pleaded, because it is *lex loci*, but not *lex terræ*; so various customs are the *leges loci*, particularly the custom of London, but yet it is to be pleaded and proved by the recorder of London's court keeper, for judges are not supposed to know the usages or customs of particular places, districts, or provinces, or counties.



## PIPON against WALLIS.—p. 402.

Two executors gave a letter of attorney to a third person to take administration cum testamento annexo. One of the executors dies, the other has a right to call in the letter of attorney, and to take a probate of the will.

*Dr. Jenner*, for Wallis.—Mary Berkeley, deceased, lived in Jersey, made her will there 23d Feb. 1740, and appointed Mr. Le Geyt and Mr. Pipon executors; they both living at Jersey, gave letter of attorney to Mr. Wallis to take administration, with the will annexed for their use and benefit. Wallis took administration in 1741, and has received great part of the effects, and transmitted them to Jersey; Le Geyt is dead; Pipon is now come to England, and has cited Wallis to bring in the administration and show cause why it should not be revoked, and probate of the will granted to him as surviving executor. We insist the administration cum testamento is granted absolutely to Wallis and cannot be revoked; the old method was to grant administration durante absentia; but that was found to be very inconvenient, for then if the executor came into England the administration expired, and suits brought by the administrator abated, and therefore that method was altered, and they are not now granted temporarily but absolutely; it is granted to the administrator by the executor's act.

*Dr. Hay*, for Pipon.—The administration does not now expire as it used to do by the executor's coming home; but he must take out process against the administrator, to show cause why it should not be revoked. The single question is, whether an executor shall not have probate when he desires it, though administration has been granted to his attorney for his use.

## JUDGMENT.

Sir GEORGE LEE.

I was of opinion, that though the administration was granted absolutely, yet that the foundation of it, the letter of attorney, was revocable; that the administrator was only an agent for the executor; that when the executor desired probate the Court was bound to grant it to him, and therefore I revoked the administration, and decreed probate to Pipon, but without costs. Then Cæsar, proctor for Pipon, prayed an inventory and account, which Godfrey Farrant, proctor for Wallis opposed, because he was not cited for that purpose; but as he was before the Court, I was of opinion he was bound to give them, because, as administrator, he swore to give in an inventory and account when lawfully required, and assigned him to give them in accordingly.

## FRANK against CARR.—p. 403.

A witness having an expectation of interest and advantage, in case the will should be established, held to be incompetent.

*Dr. Pinfold*, for Frank.—Hillersden Frank, Esq. great nephew and universal legatee in the will of Edward Wills; Ann Carr is the deceased's niece and next of kin. Edward Wills died 10th December 1749, was a pensioner in the charter-house, aged near 100; blind seve-

ral years. Will dated 1st March 1748-9, in these words: "In the name of God, amen. I, Edward Wills, of the Charter-house, being of healthful body and sound memory, do make this my last will and testament, revoking all other wills by me made formerly, and appointing John Hillersden Frank and his lawful heirs my only heir. Witness my hand, Edw. Wi. the mark D. Mary Manning, witness; Thos. Hatch."

On the day of the date of the will the deceased gave instructions to Hatch, his barber, and he wrote them down in presence of Manning, the nurse. Deceased executed the will in their presence, and gave it to her to lay away. 15th June, 1749, John Carr, clerk, son to Ann Carr, came to see deceased. Manning showed him the will; he took an exact copy of it. Declarations of affection to Frank previous to and subsequent to will, and that he would leave his estate to him; told him where his effects lay, and declared in his favour three days before his death. Disaffection to Carr—cancelled a will in her favour made in 1747 about a year before he died. After deceased's death Parson Carr was sent for, Manning showed him the will; Carr read it; and sent for Hatch; bid him bring him a razor, and Carr scratched out Frank's name, and desired him to write his (Carr's name) in the place, but he refusing, Carr wrote it himself. Next day Carr desired Manning to destroy the will, which she did; the paper propounded is the copy taken by Parson Carr, 15th June; Mrs. Carr insists deceased ordered Manning to destroy this will; and that he thought it was destroyed; they have insisted that deceased used to write his surname at length; his capacity remained to his death; Parson Carr told Parson Medcalf what he had done; Medcalf told him he had done a bad act, and by his advice Carr went to Frank's father and discovered the whole affair.

*Dr. Smalbroke*, same side.—Dates material; will in favour of the Carr family dated 21st August, 1747; deed to convey deceased's freehold estate to Edward Wills Carr, a minor, dated 26th October, 1747, he cancelled said will of 21st August, 1747, about twelve months before he died. Frank's will dated 1st March 1748-9; Carr's copy of it, 15th June, 1749; instructions to Mills, an attorney, for a new will on 6th or 7th October, 1749; beginning of November 1749, declared he would make only a verbal will; died 10th December, 1749.

*Dr. Hay*, for Carr.—Mrs. Ann Carr prays administration to her uncle, as dying intestate; deceased very covetous, stone blind, very deaf, rich, talked of his riches; sometimes said he would leave his effects to Carr, and sometimes to Frank. By will in 1747 gives his principal effects to Edward Wills Carr, and made his father executor; there is also a deed of gift in said minor's favour unrevoked: on 1st March 1748-9 deceased did dictate a paper to Hatch; in August, 1749, deceased bought a freehold estate; in October, 1749, deceased sent for the will and bid Manning read it; deceased much displeased with it; soon after sent for Mills; gave him instructions for a new will; said he would make Frank and Davis executors; deceased ordered Manning to destroy the will, she told him she had destroyed it; deceased sent to Mills to forbid him making his will, in the November before his death told Mills he would only make a verbal will; Mills went to deceased five days before his death, and he was then incapable of doing any thing. Manning did not destroy the will. Parson Carr inserted his own name instead of Frank's, on 13th December; did not inform Frank of said transaction till 23d December. Carr is interested, and his deposition

cannot be read, and, therefore, there is no proof of the copy of the will, which is propounded as a true copy.

*Dr. Bellesworth*, same side.—Three points; 1st, the copy propounded is not proved; 2d, no due execution; 3d, a revocation.

Witnesses for Frank.

1st. Thomas Hatch, barber.—Deponent well knew deceased; was his barber 1st March, 1748; deponent, by deceased's dictation, wrote a paper of the tenor with, and as he believes, in the words of, the paper A, viz. the copy pleaded; deponent read it all over to deceased audibly, in presence of Manning; deceased made his mark thereto, and then deponent wrote his name, and Mary Manning made her mark, as witnesses to said will, and then deceased ordered it to be put by; deponent did not observe, but that deceased was then of sound mind; believes exhibit A is a true copy of said will; deceased died on Sunday, 10th December, 1749; on Tuesday, 12th, deponent was sent for to deceased's lodgings, found there John Carr, clerk, and Mary Manning; Carr had the said will in his hand; deponent, at his request, fetched him a razor, and Carr scratched Frank's name out, and desired deponent to write said Carr's name in the place; deponent declined the same, by reason there was an hole made in the paper; Carr then inserted his own name in place of Frank's and then went away with said will; next morning Carr called on deponent, and carried him to the deceased's lodgings, when he produced said will, and said to deponent and Manning, that he could not be easy till the said will was destroyed, and then gave it to Manning, and desired her to make away with it, and she then tore it in pieces, and put them in her mouth, and afterwards put them in a close stool.

3. Int. Deceased made a sort of blot on the will, but cannot say whether it resembled any letters. 12. Int. Respondent was not aiding in destroying the will. 14. Int. Respondent did not examine the copy with the will, and therefore cannot swear it is a true copy, word for word with the original. 15. Int. Believes exhibits E, F, and G, are said John Carr's handwriting; deponent received them by the post.

The Rev. John Carr's deposition was offered to be read; objection made that he was interested; in support of said objection, the counsel for Ann Carr read exhibit D, which was a letter from said John Carr, dated 23d December 1749, to his mother, and which he proved on an interrogatory to be his own handwriting, in which he tells his mother, that Mr. Frank, the father of the party to whom he discovered the transaction about destroying the will, was so generous as to promise that she and he should share between them a moiety of deceased's effects, in case the will should be pronounced for; this expectation of advantage, the counsel for Carr insisted was sufficient to repel him from being a witness; on the other hand, the counsel for Frank insisted it could only affect his credit, not his competency.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion it did fully appear from the letter marked D, that Carr had an expectation of an interest and advantage in case the will should be established; that whether the father's promise was binding or not, the influence arising from Carr's expectation was the same. In the case of *Ivory v. Lambe*, Prerog. 5th Feb. 1715, where a witness had released his legacy, but upon an interrogatory said, she expected it would be paid her if the will should be pronounced for, though she was

not promised to be paid, it was held her expectation was a bias, and her deposition could not be read. So in the case of *Stirling* and *Pendleton*, Prerog. 1735, a witness who said he expected a reward was set aside; and therefore, I was of opinion John Carr's deposition could not be read.

Bishop, proctor for Frank, appealed ad statim from this order for repelling Carr, and so no more evidence was read.

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LEGGATT against LEGGATT.—p. 408.

The expenses of a commission of appraisement decreed to be paid out of the estate of an intestate.

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MOORE formerly ARUNDELL, Attorney of MOORE, against STEVENS, Attorney of SMART and SMART.(a)—p. 409.

A mariner's will which has been given as a security for a debt, held to be void.

DR. JENNER, for Moore.—John Smart, mariner on board the *Augusta*, man-of-war, made his will 14th December 1745, and appointed Thomas Moore his sole executor and universal legatee, who is now abroad, and acts by his wife as his attorney. Deceased gave instructions to Mr. Pike, of Plymouth for making this will, who drew it accordingly, and it was executed at the house of Dr. Martyn, the mayor of Plymouth, who, together with said Pike and one Norton, witnessed it. Elizabeth Moore as attorney of her husband propounded the will, and it was first opposed by deceased's mother, but is now, since her death, opposed by Stevens, as attorney for Christian and Hellen Smart, the deceased's sisters.

DR. HAY, for the Sisters.—Martyn and Pike, two of the subscribing witnesses, were utter strangers to deceased, and Norton, the third witness, is not examined, or any account given of him. Identity of the testator is not sufficiently proved, but if it was, the will was only made to secure a debt from deceased to Moore, and is therefore void by stat. 9 & 10 W. 3. We have not pleaded.

Evidence for Moore.

1. William Martyn, M. D.—John Smart, the testator in this cause, on or about 14th December 1745 applied to deponent, as mayor of Plymouth, to witness his will; he produced a will ready written, and duly executed it in presence of deponent and the other subscribing witnesses, and was of sound mind.

2. Int. Said Smart was an utter stranger to deponent; believed he executed a letter of attorney at the same time.

2. Abraham Pike.—John Smart, mariner of the *Augusta*, (as he styled himself,) gave deponent instructions for the will propounded; deceased approved and executed it in presence of Dr. Martyn, Norton, and deponent, and was of sound mind.

2. Int. To best of deponent's memory, Smart executed a letter of attorney to Moore at the same time. 3. Int. Smart was an utter stranger

(a) This case is reported in a note to the case of *Zacharias v. Collis*, 3 Phill. 176. [1 Eng. Eccl. Rep. 389.]

to deponent. 6. Int. Cannot depose whether the will was made to secure a debt or not.

3. Robert Quin.—Deponent well knew John Smart, of the Augusta, who he takes to be the testator in this cause; deponent and he went together in the Ruby man-of-war to the East Indies, where Smart died.

2. Int. Verily believes, but cannot positively depose, that John Smart, the testator in this cause, and he that died in the Ruby, was the same person. 6. Int. Believes the will was made to secure a debt to Moore. 7. Int. Believes the name "John Smart" to the will is said Smart's writing, but cannot be positive. 8. Int. Has heard and believes deceased was indebted to Moore at his death; believes the will and power was a security for said debt.

4. Judith Hill.—Deponent knew John Smart, of the Augusta, and afterwards of the Ruby; believes he was the testator in this cause, for he was an acquaintance of Moore's, and indebted to him.

6. Int. Believes the will was made to secure a debt, for deponent has heard Elizabeth Moore say the overplus of deceased's effects, after her husband's debt was paid, was to go to Smart's mother. 8. Int. Deponent knows Smart, the deceased in this cause, was indebted to Moore, and believes the security for said debt was the will.

5. Thomas Christy.—Believes the deceased John Smart in this cause, was the same John Smart that died in the Ruby.

6. Int. Does not believe deceased intended to leave all his effects to Moore, but only to secure his debt to him. 7. Int. Respondent has seen deceased write; the name subscribed to the will looks like his writing, but cannot be positive it is so. 8. Int. Knows deceased was indebted to Moore; heard him say he had given a will, power, and bond, to said Moore, to secure said debt to him.

*Dr. Jenner*, for Moore.—Identity is proved from the several witnesses, taken together. They should have pleaded that the will was made to secure a debt. It ought not to be proved upon interrogatories, because we have no opportunity of counter-pleading.

*Dr. Hay*, for Smart.—*Craig and Leicester* (a), Prerog., December, 1713, and afterwards in the Deleg. (b), Jan. 1739—Prerog., *Harwood v. Leke*; Prerog. Trin. 1750, *Anderson v. Ward*. In all those cases, the wills of mariners were set aside, because they were made only to secure debts.

#### JUDGMENT.

SIR GEORGE LEE.

I was of opinion the identity of the testator was tolerably well proved, but I thought it sufficiently appeared that this will was made to secure a debt to Moore; that from the cases cited and others, it was a settled point that wills made by seamen to secure debts were void; that the evidence thereof had generally arose upon interrogatories, and not upon pleas; particularly it was so in the case of *Ivie v. Preston and Brown*, Prerog., 25 June, 1741, (see my large Case Book) where the proof was much slighter than in the present case, but yet that will was set aside. I therefore gave sentence against this will of Smart's, and pronounced him to be dead intestate so far as appeared to me, but did not give costs.

(a) *Craig v. Leicester*, cited by Sir John Nicholl, in his judgment in *Zacharias v. Collis*, 3 Phill. 189. [1 Eng. Eccl. Rep. 389.]

(b) Deleg. 11th June 1714. Mr. Justice Blencow, Mr. Baron Bury, Sir Nathaniel Lloyd (K. A.), Dr. Herriott, and Dr. Henchman, were the Judges Delegates present at the sentence.

## KNIGHT against COOK.—p. 413.

Will torn to pieces after the death of a testator, directed to be pasted together.  
Probate decreed in common form.

Dr. *Simpson*, for Elizabeth Cook.—Elizabeth Perry died in November, 1752, a widow, without any relations. 10th October, 1749, she made a will, attested by three witnesses; gave to John Knight, who was her husband's nephew, 30*l.* and legacies to his children, and made Joseph Cook executor. 4th May, 1751, she made another will, attested by three witnesses; gave 40*l.* to John Knight, but nothing to his children, and appointed Joseph Cook and Elizabeth Cook, his wife, executors. 3d November 1752, after deceased's death, John Knight and his wife being at Cook's house, Cook sent for Griffith to read the last will to them; Mrs. Knight being angry that deceased had left nothing to her children, snatched the will out of Griffith's hand and attempted to put it in the fire, Griffith prevented her, and then she tore it into small pieces; Joseph Cook is since dead. John Knight as being a legatee, cited Elizabeth Cook to bring in all scripts and scrolls, and to prove the last will by witnesses; she brought in scripts and scrolls, and prayed probate in common form of the will, dated 4th May 1751; Knight's proctor declared he did not insist (as being a legatee in the first will) on proving the last by witnesses, and Knight made an affidavit that he knew of no relations deceased left; and Griffith made affidavit that the will was torn in manner above stated by Elizabeth Knight after deceased's death.

*Per Curiam.*

Upon the single affidavit of Griffith, I directed the will to be pasted together, and probate to pass in common form to Elizabeth Cook the surviving executrix.

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## ARCHES COURT OF CANTERBURY.

MINTY alias MISITA against GOULD and MONTGOMERY.

—p. 414.

Legacy pronounced for.

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WINCHLOW, Administratrix of SMITH, against SMITH.—p. 416.

*On fuller Answers.*

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Answers in a proceeding for an inventory and account, held to be sufficiently full.

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BIRD, alias BELL, against BIRD, (a).—p. 418.

Alimony allotted pending suit.

(a) Vide *supra*, p. 375.

BIRD brought suit against Bell, his wife, for nullity of marriage, by reason she had a former husband living when she married him. She gave in an allegation of faculties, and in his answer thereto he admitted, that he is by trade an anvil maker, and gets by his trade 100*l.* a year clear, and is worth about 1000*l.*; has three children by a former wife, and ten grandchildren, whom he at times assists with money. Upon settling alimony pending the suit, I allowed her 20*l.* a year, to be paid quarterly from the return of the citation against her; and her proctor porrecting a bill of costs, which amounted to 60*l.* 1*s.* 4*d.*, and his proctor declaring he had no objection to it, and the register informing me he had perused it, and that the several articles were reasonable, I taxed it at 60*l.* besides the monition, to be paid thirty days after service of the monition which I ordered not to pass under seal till after fifteen days.

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## PREROGATIVE COURT OF CANTERBURY.

SMITH against CORRY, falsely calling herself SMITH.—p. 418.

An administration granted on false suggestion, revoked.

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Lady ANN JEKYLL against JEKYLL.—p. 419.

Instructions in the handwriting of a party deceased, purporting to dispose of real and personal property, held not to be entitled to probate. 446

DR. Paul, for Lady Ann.—Joseph Jekyll, Esq. died 17th November, 1752; made a will, dated 20th November, 1749, all wrote and signed by him, but not attested, nor any signature wrote; contained only personal estate, made no executor, but appointed his wife Lady Ann universal legatee and guardian of the child with which she was then pregnant. This will is marked A, and is propounded by Lady Ann. On the 9th of November, 1752, he came to London, in order to go abroad for the recovery of his health. On the 10th of November, he went to Mr. Baldwin, his attorney, and gave him instructions in his own handwriting, and by word of mouth, for preparing a draft of a will for both real and personal estate against Sunday the 12th of November, when he said he would come again to him and peruse it, in order for execution. These instructions wrote by deceased, in which he gives to each of his brothers and sisters 500*l.*, and makes Lady Ann and his brother Blacket Jekyll executors, are propounded by Thomas Jekyll, one of his brothers, as a legatee. The instructions are marked B. The deceased was afterwards taken ill on said 10th of November. On 12th November a message was sent to Baldwin, to acquaint him that the deceased was ill and could not come to him that day. The deceased did nothing more towards carrying said schedule into execution, and therefore must be deemed in law to have departed from it.

Dr. Jenner, same side.—Will, 20th November, 1749, contains only personal estate, the latter paper contains his whole estate, real and personal. The benefit Lady Ann had from the personal estate by the first

will is diminished, and the benefit intended her by the instructions out of the personal estate cannot take place.

*Dr. Hay*, for Thomas Jekyll.—Caveat entered. Lady Ann propounded will of the 20th November, 1749, which I admit is proved to be deceased's handwriting; by that will he leaves all his personal estate to Lady Ann. Schedule B, the instructions of Friday, the 10th of November are entirely wrote by deceased. Baldwin was the deceased's attorney; the deceased told him he was going abroad the Monday or Tuesday following, and bid him make a will, to be ready by Sunday, 12th November, and he would then look it over and execute it. By the instructions, it appears the deceased intended to vest a real estate in trustees; gives 500*l.* to each of his brothers and sisters, and made his wife guardian of his daughter, and she and Blacket Jekyll, executors. Sunday at noon, Baldwin received a note in Lady Ann's handwriting, acquainting him that the deceased was ill and could not come to him that day. Deceased was not apprehended to be in danger, even on the day he died, and he never thought himself in danger. Baldwin says, he believes deceased would have completed his will if he had thought himself in danger of death.

*The will* marked A, being admitted by the counsel for Mr. Jekyll to be all of deceased's handwriting was read on behalf of Lady Ann, and on the other side, Lady Ann's counsel admitted the instructions marked B, were all of deceased's handwriting.

Witnesses for Mr. Jekyll.

1. Samuel Baldwin, gent.—Deponent had for several years done business for deceased as his attorney. On Friday, the 10th of November, 1752, deceased came to the deponent, and said he intended to go to France for the recovery of his health the Monday or Tuesday following, he having been ill some time, and said he was come to give him instructions for making his will; the deceased then in a great hurry wrote the paper of instructions marked B, and gave it to the deponent, and bid him prepare a will from the said paper, and from instructions he then gave deponent by *word of mouth*, against the Sunday morning following; the deceased was then of sound mind. Since the deceased died, the deponent has heard Lady Ann say, that in coming to London the last time, she and the deceased talked about making his will; the deceased said he would, and she should make it for him, and she pressed him to give his brothers and sisters a 1000*l.* a-piece, if his daughter died under age; he said he thought that would be more than his estate would bear, and said he would not leave them more than 500*l.* a-piece. On said 10th of November, deceased left with deponent his marriage-settlement, from which deponent took the description of his lands, to be settled in trustees; the deponent dictated to his clerk the draft of a will, conformable to deceased's instructions; the deceased directed the deponent to get said draft ready for his perusal by Sunday morning, and he would then come and settle it for execution. On Sunday, 12th November, the deponent staid at home for the deceased, and about one o'clock at noon he received a note, he believes of Lady Ann's writing, that the deceased was ill, and could not come. From said 12th November to the deceased's death, the deponent sent daily to his house, and never understood he was thought in danger of dying.

6. Int. Believes deceased would have completed his will if he had thought himself in danger.



2. Charles Jerningham, M. D.—Deponent attended deceased on the 17th November, found him very ill, but did not think he would have died so soon, but he did die that evening.

3. Peter Shaw, M. D.—Deponent well knew deceased, attended him as his physician eight or nine days before his death twice a-day; deponent apprehended he had an irruptive fever of a bad sort, but deponent spoke comfortably to him and his lady, but thought the event uncertain; he died sooner than the deponent expected. Deceased did not seem to apprehend danger, but talked of going to Italy. On the 17th of November, in the afternoon, Dr. Jerningham said he hoped there was no immediate danger, but he died soon after; he had a rash, which deponent thought a favourable symptom.

*Dr. Paul's* argument for Lady Ann.—Deceased left paper B, with Baldwin only to prepare a will for his perusal on the Sunday, not to be then executed; the question is, whether paper B, can revoke the complete will A. No recognition of B; no act done, though deceased was so long ill; by law, therefore, paper B is not valid. *Plumstead's Case*, Prerog. 1727. *Deleg. Calamy and Limbery against Hyde and Mason (a)*. Prerog. 1732, *Devon against Devon*, the testator's deferring to complete his will for a week, was held to be a departure. Prerog. *Child* against

(a) PRÆROGATIVA, tertiâ sessione, Pasche, May, 19, 1731.

DR. BETTESWORTH, JUDGE.

DR. CALAMY and LIMBERY contra HYDE and MASON.—p. 423.]

MR. MASON, an attorney, possessed of a considerable real estate, and about 30,000*l.* personal estate, made his will, 23d June, 1729, and a duplicate thereof, and thereby appointed Dr. Calamy and Mr. Limbery his executors; one duplicate he kept in his own custody, and the other he gave to Limbery, and with it a letter, giving an account of his estate, and where his several effects lay. By this will he devised his lands to his brother, and the residue of his personal estate, after his debts and legacies paid, to the widows and children of dissenting ministers. Some little time before his death, the deceased, with his own hand, made several obliterations and interlineations upon the duplicate in his custody, and by these alterations gave his land to Mr. Hyde, made him sole executor, and devised to him all the residue, and charged his real estate with an annuity of 200*l.* per annum to his brother, and gave him 1000*l.*, and devised some other legacies different from what was contained in his will before, and then makes a fair draught of his will with his own hand, thus altered, adding some more legacies to it, and wrote about two sheets of a duplicate of this fair draught. In the altered will he changed the date from 1729 to 1730, and in the fair draught left a blank for the date.

The cause appeared before the court upon these bare facts, without any pleadings or any evidence but what arose from the answers of the several parties, and the confession of all sides, that the alterations, and the draught in pursuance thereof were wrote by the deceased.

Calamy and Limbery propounded the first will. Hyde set up the new schedule aforesaid, wrote from the altered duplicate, as a testamentary schedule; and Mason opposed both in order for an intestacy.

*Per Curiam.*

Where an unfinished paper remains alone, the Court often carries it into execution. This paper cannot operate as to the real estate, and the deceased being a lawyer, must know so much; he had time to have completed the schedule, and his not having done so is a proof of his departing from it. There being duplicates of his first will makes a material difference, for the obliterating one duplicate does not destroy the other, unless it appears testator had such intention, and in this case, if that had been his intention, he might easily have sent for the other from Limbery. It appears, from Calamy's answers, deceased had thoughts of making a new will, on account of alteration in his circumstances, but at same time declared that if he should die there would be no confusion, he had so well settled his affairs, and that he had taken care of the dissenting ministers, which could not relate to the schedule, by which no provision was made for them. Upon the whole, the Court was of opinion, that the first will did still subsist, and was a good will.

*Mr. Rushworth*, proctor for Hyde, appealed ad statim, and the Court, at petition of Sayer, pro Calamy and Limbery, assigned him certificandum de prosecutione, the first day of next term.

Law quoted by *Dr. Paul*, for the first will:—*Instit. tit. quibus modis testam. inf. § 7; Vin. cod. verb. credible est; Digest, lib. 28, tit. 4, l. 4. Gothof. gloss. cod.; Swinh. p. 7, § 14, case 4, 2; Vernon. 650, Tyrer's and Oryon's case*, A. made two duplicates, afterwards cancelled one,

*Edwards*, the same. Deleg. *Duke of Somerset against Sir John Jacobs* (a). Deleg. Case on *Governor Harrison's will*, 5th February, 1738. Deleg. *Combe against Combe*, will for real and personal estate set aside, because it could not operate for both. Prerog. 1748, *Barkeley against Warner*.

and declared he would have cancelled the other, if it had been in his custody, pronounced in that case to have died intestate. *Fye and Caron's case*.

*Dr. Henchman*, pro Mason, quoted the case of *Whitehead and Jennings*, in the Delegates. A. made his will duly executed, then made another will with another executor; last will was lost. Question was, whether the first should revive; determined it should not, because there was a new executor appointed by the last will.

N. B. November the 23d, 1732, this sentence was affirmed in the Delegates, vide my notes, and again upon a review; *Walter and Jones*, eodem die, same, vide my notes. (This case is copied from Sir George Lee's MS.)

The Judges Delegates who were present at the sentence in *Calamy and Limbery v. Hyde and Mason*, on 3d November, 1732, were, Chief Justice Raymond, Mr. Justice Probyn, Dr. Tindall, and Dr. Branstons. The Commission of Review seems to have been appointed on 30th May, 1733; judgment was given on 5th November, 1734; the Judges present being the Chief Baron Reynolds, Mr. Justice Henage, Mr. Baron Comyns, Sir Henry Penrice, Judge of the high court of Admiralty, Dr. Pinfold, and Dr. Kinastons.

(a) This case was much relied upon by Sir William Wynne, in his judgment in *Passey v. Hemming*, Prerog. 1806, but from the want of any accessible report of the case, the facts were misapprehended.

DELEGATES, *Serjeants' Inn, Chancery Lane, January the 22d, 1725.*

DUKE OF SOMERSET contra SIR JOHN JACOBS.—p. 425.

Lord Allinton died in the year 1723, leaving a complete will, made in the year 1685, and also three testamentary schedules made about the year 1708, all which were very imperfect. By the complete will of 1685, Sir John Jacobs was appointed executor and residuary legatee. Duke of Somerset prayed that the said will should be set aside, and that Lord Allinton should be pronounced to have died intestate, alleging that the above-mentioned schedules did not amount to a revocation of the will. It was urged by the counsel for the Duke, that the beginning the said schedules was a manifest proof that the deceased did not intend the said will should stand as his last will and testament, and that any such declaration in writing was sufficient to revoke a testament, because the intention of the deceased only was to be considered, and in this case the beginning new testamentary schedules, in which he declared expressly that he did thereby revoke all former wills by him made, using these words "*herely revoking*," &c. was a full proof that he did not intend the former will should stand, especially considering that the former will was near forty years old, and that there had happened a very great change in the circumstances and condition of the deceased since his making of it; and to show farther that he did not intend it to be of any force, it was proved that he said he had no will. The question upon the whole matter was this, whether the imperfect schedules which contained only some few legacies, would amount to a revocation of a will complete, which still remained uncancelled.

Dr. Bettsworth, in the Prerogative Court, gave sentence for the will against the schedules, and the Delegates confirmed the said sentence.

In this case *Serjeant Commins*, counsel for the will, said in his reply that a declaration of a man that he has no will, is no proof against a will found. *Serjeant Jeffrey's case*, in Goldborough, f. 33, a latter will in confirmation of a former is no revocation of a former. A will is a complete act, and therefore a man may revoke without any devise, an incomplete will may revoke a complete one, but every inchoation of a will, with a general clause of revocation is not sufficient; there is a great diversity where sudden death prevents the completion of a schedule, and where it is intermitted voluntarily. A will that is partial may revoke one that is general. Where any thing is done animo testandi, that, though incomplete, is a revocation si non animo testandi secus. Inserting something in the body of a schedule is not of the same force as the testator's signing it with his own hand. A man's approving what is wrote is not sufficient, if he did not direct it.

*Dr. Henchman* on the same side.—The Delegates in this case must either pronounce for the will, or declare an intestacy, because the schedules have not been propounded. If the deceased is pronounced to have died intestate, the schedules can be of no use, whereas they do contain bequests recoverable at law, and therefore the schedules ought to be taken as part and parcel of the will. A testament without an executor is not valid as a testament; Swinb. part 5, No. 4. Without an executor no will can subsist; therefore, such a will cannot revoke one with an executor, unless it be made in extremis. It is a rule of all laws that agnatio liberorum rumpit testamentum; the bare writing something in a paper is not a confirmation of the whole.

*Dr. Phipps*, on the same side.—A contraria voluntas is not estimated from any small variation in a will, but from the essential parts of it being changed, and these are, the nomination of

Deleg. *Williams and Wynne*. Deleg. 1751, *Beaumont against Sharpe*, case of Jordan's will.—It does not appear deceased ever spoke of his will from 12th November to his death.

*Dr. Jenner*, same side.—Deceased imposed a condition on himself that paper B, should not operate till he had perused, approved, and executed it. The deceased's whole intention cannot be carried into execution. Prerog. 1752, *Berrow and Cox*.

*Dr. Hay and Dr. Bettesworth*, contra.—It was not deceased's intention to benefit Lady Ann by paper B; it was wrote by deceased but seven days before his death, appoints executors; where there is a constat of a testator's intention, it is to be supported. Object.—Paper B, contains real estate, and cannot operate as to that, because it is not executed. Answ.—There is no general rule that a will shall not operate as to personals, though not good for real estate. Comyn's Rep. fol. 453. Deleg. 1721, *Brown and Heath against Pocklington*, will for both real and personal estate, not executed, held good for the personal. Deleg. *Watkinson against Wosey*, the same. Deleg. *Beaumont and Sharpe*, the same, where it appears clearly that a man intended equally to provide for all his next of kin, and made provision for some of them out of his real, and for others out of his personal estate, and the benefit out of the real estate cannot take effect for want of execution, the will shall be set aside, because if the testator had foreseen that event, he would have made a different disposition. The use of deceased's house, &c. given by B, to Lady Ann, cannot be considered as a compensation for the loss of what was given her in the will A, out of the personal estate, more than is given her in paper B, because there is no proportion between the value of the one and the other. Prerog. *Walker and Martin against Mitchell*, a departure must be proved by evidence, or from clear presumptions. Deleg. *Smith against Cunningham*, the question here is, whether deceased died with full intention of confirming the instructions, if he did, they must be pronounced for. Prerog. The case of *Serjeant Wynne against Baker*.

#### JUDGMENT.

SIR GEORGE LEE.

I was of opinion the paper B, could not be pronounced for as deceased's last will, because it was very imperfect; the testator's name did not appear in it; it was not intelligible without explanation, and it was not explained by the evidence; contained real and personal estate, but could not operate as to the real; and yet he as much intended Lady

an executor, &c. Gratiani disceptationes forenses, Discep. 764, nu. 1. A general clause of revocation does not revoke, but it must be made *simpliciter* as to the former will, *ibid.* nu. 7, et nu. 26. A diversity is to be taken where a revocation is in *general*, and where it has a respect to a *testament to be made*; the one case has a respect to intestacy, the other to a different devise to be made, and then the parties under an intestacy being *certain*, and in the other case not, such a general revocation is more to be regarded than the other.

*Dr. Andrews*, same side.—No instance of an imperfect schedule of fourteen years standing ever pronounced for as a testament in any ecclesiastical court; they are only held good when the deceased was *morte preventus* from finishing it. Swinb. part 7, cap. 12.

*Dr. Sayer*, on the same side.—A second will, with the same executors is no revocation. The case of *Fuller contra Wicks et alias*, in the Prerogative, anno 1715

N. B. The schedules not having been propounded, the Delegates did not pronounce them to be a part of the will, but took no notice of them. (This case also is transcribed from the MS. notes of Sir George Lee.)

The Judges Delegates present at the sentence in *The Duke of Somerset v. Sir John Jacobs*, (on 22nd January, 1725) were, the Bishops of St. Asaph, Gloucester, and Hereford, Lords Bathurst and Guildford, Chief Baron Gilbert, Mr. Justice Reynolds, Sir Henry Penrice, (Judge of the Admiralty) Dr. Tindall, and Dr. Audley.

Ann a benefit out of the real, as he intended the legatee a benefit out of the personal estate; he had sufficient time to have carried it into execution, but did not, and had not shown by any act or declaration, that he desired it should operate as to his personal estate, though it could not as to his real; and lastly, it appeared clearly that paper B, did not contain his whole will, for Baldwin swears deceased directed him to make a draft of a will from B, and from other instructions he gave him by word of mouth. I therefore pronounced against the validity of the paper marked B, propounded by Mr. Jekyll, and for the validity of the complete will marked A, propounded by Lady Ann Jekyll, but did not give costs.

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BOND against Bond.—p. 429.

Objection to the sureties offered for an administrator's bond over-ruled.

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SAVILLE against MORGAN.—p. 431.

The Court has no jurisdiction to direct an inventory of a leasehold estate under lives which was held on a mortgage. An inventory ordered as to the other effects.

*Dr. Pinfold*, for Morgan.—Peter Morgan is the deceased; Morgan the executor, is cited by Saville, a creditor, to take probate and give in an inventory, &c.; Morgan took probate, and exhibited a declaration; therein he sets forth that Saville was possessed of a leasehold estate of deceased's, which was mortgaged to him, and has received the rents and profits, and has likewise laces and long lawns which belonged to the deceased, in his custody, and therefore prays an inventory from him; Saville alleges that he is not obliged to give an inventory, for he has lent money to deceased, which is secured to him by mortgage of said leasehold estate and goods, and he is accountable only in chancery.

*Dr. Simpson*, for Saville.—Morgan, in his declaration on oath, says, his father the testator mortgaged the leasehold estate to Saville, and that Saville is in possession thereof; the estate is a leasehold for three lives; the legal estate is in Saville the mortgagee, and the mortgage can be redeemed only in chancery.

JUDGMENT.

SIR GEORGE LEE.

As Morgan had confessed in his declaration that Saville was in possession of the leasehold estate by virtue of a mortgage, I was of opinion I had no jurisdiction over that, or the rents thereof, but that he was accountable only in chancery; but as it did not appear by evidence, that the laces and lawns were comprised in the mortgage, I ordered Saville to give an inventory of them.

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SMITH against CORRY falsely calling herself SMITH.—p. 432.

Admission of an allegation opposed on the ground that the party giving it in had been condemned in costs, which remained unpaid, but as no monition to enforce the payment had been served on him, the objection was not sustained.

**LAST, formerly PECK against BROWN and Others.—p. 433.**

Probate of a former will revoked, in order that probate might be given of a later will.

*Dr. Simpson*, for Mary Last.—30th March 1753, Last took out a decree against William Brown, pretended executor of William Peck deceased, in a will dated 28th April 1744, and against John Jessas and Robert Darling, assignees in a commission of bankruptcy, issued in July 1750, against Brown, to appear on 12th April to bring in said will, and to show cause why the probate should not be revoked, and why probate of a later will dated 4th October 1749, should not be granted to Mary Last the deceased's sister and executrix therein named. Decree was served on all the parties personally. 12th April 1743, Fanshaw appeared for the assignees; Brown not appearing, was decreed excommunicated.

2d Sess. Easter Term. Hughes appeared for Brown, and was assigned to bring in the probate, and Fanshaw was assigned to declare whether he opposed the last will.

4th Sess. Trin. Term. Fanshaw for the assignees, declared he did not oppose the last will; but Hughes, for Brown, said he would oppose it; Smith, for Last, alleged Brown, being a bankrupt, had no interest. The Court assigned to hear on Hughes' petition this day; Hughes has not delivered his act; Smith gave him notice he would move the Court this day; Hughes now alleges Brown is applying to have the commission of bankruptcy superseded, and therefore prays time till next term. Prerog. 1737, in *Heysham and Bowyer* against *Trubey*, held a bankrupt had no interest, and that his assignees only could oppose a will. Prerog. *Shehan* against *Webb*, Shehan, the executor, becoming a bankrupt, his assignees intervened and carried on the cause.

**JUDGMENT.**

**SIR GEORGE LEE.**

I pronounced against Brown's interest, revoked the probate of the first will granted to him, and decreed probate of the latter will to Mary Last, deceased's sister and executrix.

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**ARCHES COURT OF CANTERBURY.**


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**LLOYD against OWEN and WILLIAMS.—p. 434.**


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*Appeal from Bangor.*

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Indecency during the performance of divine service not proved.  
The sentence of a Diocesan Court reversed.

## PREROGATIVE COURT OF CANTERBURY.

FIRTH against FINCH.—p. 437.

A legatee consents to release his interest that he may be examined as a witness. Some specified legacies are omitted in the release. The Court allowed the witness to exhibit another release, and to be repeated to his deposition.

SARAH NICHOL, widow, deceased, made her will, and appointed William Firth executor. Her daughter and next of kin, Sarah Finch, opposed the will. Firth propounded it by a common condidit, afterwards exhibited another allegation, which was admitted, and a commission granted for examining witnesses in the country. He produced John Nichol, deceased's grandson, as a witness thereon, who had legacies in the will, in these words: "I give to my grandson, John Nichol, the sum of 100*l.*, and my large silver tankard, and silver soup spoon, and two silver table spoons, and the long table, and two forms in Battler's Green kitchen." Before he was sworn he exhibited a release of the 100*l.* legacy, but the substitute in the country, for Mr. Collins, proctor for Firth, by mistake, omitted to insert the specific legacies in the release. He was then examined upon the allegation, and cross-examined, and the commissioners returned the commission, with the release and depositions, to the Court. Mr. Collins being informed of the above defect in the release, prayed that John Nichol's deposition may be suppressed till he has given a release of all his legacies under the will, and that then he may be again repeated to the same deposition, or may be re-examined, and alleged that publication had not passed, nor had the depositions been seen. *Cheslyn*, proctor for Finch, opposed this motion.

Firth's council cited and relied on the case of *Judger and Mann* (a), Prerog. 30th Jan. 1753, as a case in point.

## JUDGMENT.

SIR GEORGE LEE,

I was clearly of opinion the witness was at liberty to exhibit another full release, and that then he should be repeated to the same deposition, from whence no inconvenience could arise. Accordingly John Nichol being in Court, he exhibited a release of all his interest under the will, and then I gave him the oath of a witness, he being produced as such by Collins, and ordered the return of the commissioners to be opened, and his deposition to be taken out, which was done, and he read over the whole deposition to himself in court, and was then repeated to it in court, and he openly declared the deposition was true upon the oath he had taken, and to his mind; and I condemned Firth, Collins' client, in 1*l.* 6*s.* 8*d.* costs for the expense of this motion, which Finch had been put to by Firth's neglect in not exhibiting a proper release at first.

(a) *Vide supra*, p. 372.

PLUNKETT formerly SHARPE against SHARPE.—p. 439.

*On Admission of an Allegation.*

A question as to how far certain exhibits could, under any circumstances, be admitted as evidence.

THOMAS SHARPE died intestate 20th November, 1751, without children; left Ann, his widow, a minor, now married to Plunkett; 13th December, 1751, administration of deceased's effects was granted to her father, as her guardian, till she should come to age; deceased's fortune was in the hands of his brother William Sharpe; the administrator applied to William to account with him for deceased's fortune; William paid several sums part of deceased's fortune, and took Ann the widow's receipts for the same, she being come to age; the administration to her father expired and then she as widow applied for administration to her said deceased husband; William Sharpe the brother opposed her, and denied her marriage to deceased, Thomas Sharpe; she propounded her interest, and gave an allegation setting forth a public courtship at her father's house, from March to October, 1747, not only with privacy of her family, but also of William Sharpe, and the rest of the deceased's family; that at his, the deceased's request, she consented to be married privately; and in 3d Article of allegation alleges, that they were married at the Fleet, on 13th October, 1747, by William Dare, a clerk in holy orders, since deceased, in the presence of one Foxal, who acted as clerk, and gave her away, at the house of the widow Bates, who as well as Foxal is also since dead; that the said Bates' daughter, Elizabeth Hayward, was present below stairs, saw the deceased and Ann come into the house and go upstairs with Dare and Foxall to be married; and saw them come down again, when they owned they were married; and the deceased in her presence paid Dare three guineas fee for the marriage, and Dare demanded half a guinea more for the certificate of the marriage, but deceased not having so much money in his pocket, he pawned his watch for the same, and a few days after came and redeemed it; pleaded public cohabitation with reputation and owning from a short time after 13th October 1749, to his death, in November, 1751, and that William Sharpe, the party, and the rest of deceased's family, owned and treated her as his wife, and pleaded instances thereof; and in 18th Article, pleaded death of Dare; and that he had often declared he knew deceased, Thomas Sharpe, and had married him to said Ann; and in 19th Article, pleaded that the abovesaid certificate of marriage from Dare, (in which he certified that Thomas Sharpe and Ann Bank were married together in the parish of St. Sepulchre's, as appeared from the register of marriage in the hands of Bates,) was found among the deceased's papers, and that it was signed by William Dare, and that he would not have signed a false certificate; and laid identity of persons.

*Dr. Simpson*, counsel for Sharpe.—Opposed only said 3d, 18th, and 19th articles; 3d, because there was nobody present who is now living at the marriage, and therefore could not be proved.

JUDGMENT.

SIR GEORGE LEE.

But I admitted the 3d Article, because she might be relieved by

Sharpe's answers, and the facts to which Hayward was specified were very material to create a presumption of marriage, and upon interest, cohabitation with reputation and owning, were sufficient to establish a marriage; but I rejected the 18th and 19th Articles, because I was of opinion that Dare's declarations would not be evidence, when even his evidence upon oath, if he had been examined, could hardly have had any credit given to it; and as to his certificate, it was not evidence, and could not have weight in any court; and though it was offered only as a circumstance, yet if credit could not be given to it, it could not be received to any purpose, and though two articles of an allegation in the cause of *Reddaway* and *Reddaway*, Prerog. 1st Sess. Hil. 1747, which were read and appeared to be almost verbatim the same as these articles, were admitted by *Dr. Bellesworth* my predecessor; yet I said I could not be of the same opinion, that if my judgment was wrong, it might be redressed by appeal, but till the Delegates had determined that such declarations and certificates were evidence and ought to be received, I never would admit them, and therefore I rejected the 18th and 19th Articles, and admitted all the rest of the allegation.

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## ARCHES COURT OF CANTERBURY.

DENT, by his Guardian, against DENT.—p. 442.

An executrix condemned to pay legacies.

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## PREROGATIVE COURT OF CANTERBURY.

LASCELLES and LASCELLES against JOBBER and Others.—  
p. 443.

A party held not to have established his right to pray an inventory.

ANN MILLINGTON died intestate; divers persons claimed to be her next of kin, who denied each other's interests. In 1746, administration pendente lite was granted to Henry Lascelles, Esq., who gave in an inventory of the personal estate, which amounted to upwards of 20,000*l.* and gave security in 50,000*l.* Alice Marchant, who claimed to be cousin-german and next of kin to Ann Millington, died, but made her will, and appointed Walter Jobber and others her executors, who intervened in that cause for Marchant's interest. Before the suit relating to Mrs. Millington was determined, Mr. Lascelles, the administrator pendente lite, died, but made his will, and appointed his sons Edwin and Daniel Lascelles his executors. Mr. Jobber pretending interest, entered caveat against proving Mr. Lascelles's will, and prayed an inventory from his executors of Ann Millington's effects. Suggested that Lascelles had made interest of Millington's money, and therefore had now, at his death, more of her estate than he had when the first inventory was given in; but, as Marchant's interest had not been pronounced for, her represen-



tatives were not creditors of Lascelles's estate, and had no right to pray an inventory in the manner they had done from his executors; indeed, if the cause relating to Millington had not been concluded, and set down for hearing as it is, they might perhaps have had a right to call for a further inventory from Lascelles, or his representatives in that cause, but they could not in this; I therefore rejected Jobber's petition.

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DAVIES against DAVIES and EVANS.—444.

Will found with the seal torn off, in the repositories of the deceased; held that the act was done *animo cancellandi*. Declarations by the deceased on his death-bed not deemed to be sufficiently specific to revive the will.

THOMAS DAVIES, bachelor, died 2 Oct. 1751, made a draft of a will with his own hand, which he carried to Mr. Hale Wortham, an attorney at Royston, who drew a will for him exactly conformable to it, bearing date 7th Dec. 1749. Deceased left Thomas and John Davies, his nephews, and Jane Evans, his neice, his only next of kin, by his will he left his nephews and niece legacies of 30*l.* each, but made his two nephews executors and residuary legatees. The night he died search was made for his will, and in a box in his chamber, this will and the draft of it were found tied up together in a piece of paper, and sealed, but this seal was torn off from the will, and put within it. Two questions were made,—first, whether this will, which was admitted to have been duly made and executed by the deceased, was cancelled by him; and secondly, whether, supposing he did cancel it, it was not revived by declarations he made on his death-bed, that he had settled his affairs, and that his nephews were his heirs and executors. At the time of finding the will, it was supposed to be of no effect, and therefore, Thomas Davies, on the 8th of Nov. 1751, took administration to the deceased as dying intestate. In Sept. 1752, Jane Evans cited him to make distribution; whereupon, in Oct. 1752, John Davies, who was the other executor named in the will, cited his brother, the administrator, to bring in the administration, and show cause why it should not be revoked, and why probate should not be granted to him of the will. Thomas Davies brought in the administration, and declared he did not oppose the will. Jane Evans then intervened and opposed it, and John Davies propounded it.

N. B.—John Davies was security for his brother's administration, and was privy to all the transactions.

Witnesses for Davies.

1. Hale Wortham, gent.—Was offered to be read, but the factum and due execution of the will being admitted, no evidence was read to that point.

2. Henry Bellein.—Deponent first knew deceased in 1736; was intimate with him to his death, which happened on 2d Oct. 1751. Deceased had great love for his nephews, particularly for John, and often said they should have the bulk of what he left. On 30th Sept. 1751, deponent asked deceased if he had settled his affairs; he replied, "I have not lived so long in the world without settling my affairs in a proper manner." Deponent asking him in whose favour; he replied, his

nephews, and that they wished him dead for what he had, and said, he had made them his heirs or executors, or to that effect.

N. B.—The exhibits on both sides were admitted to be proved.

3. William Stevens.—Deponent has heard deceased say, Jane Evans was a proud, saucy slut.

4. Robert Fig.—The same.

5. Ann Gyburn.—Knew deceased thirteen or fourteen years. On the 1st of Oct. 1751, attended deceased as his nurse, and was with him to his death; when deponent came to him, she told him he wanted a clean cap, but he said he would not put on a clean one till his nephews came, whom he said he had sent for; he seemed impatient till they came; they came in the afternoon of the 1st of Oct. 1751; deceased received them with great kindness, and seemed overjoyed at seeing them, and called for wine and drank their healths, and then delivered to them all his keys; he was very sensible.

5. Int. Deceased did not seem to think himself in danger of death. 7. Int. Would not let any body have his keys till his nephews came.

6. Williams Stevens.—Deponent well knew deceased; in evening of the 30th Sept. 1751, deponent went to deceased, and deponent and Jackson, at whose house deceased lodged, went into the deceased's room; deponent proposed to him to send for his nephews; deceased said, "For what?" the deponent reminded him that he had formerly bid the deponent send for them if he should be ill; deceased after some pause, said, "Send for Jack," and deponent sent for both.

1. Int. The deponent did not press deceased to send for them. 3. Int. The deponent was present at the search for the will, when the bureau was first searched, and the box was not searched till the last. 6. Int. Believes deceased did not think he should die.

7. John Blythe.—The deponent intimate with deceased; speaks to affection for his nephews; the deponent, within a month of his death, has frequently heard deceased say they were his executors and would be the better for what he had; heard him say within a month before his death, he had made his will; the day before he died, deponent asked him if he had made his will, and he said he had, "Do you think I have lived so long and not settled my affairs; I have settled them in favour of Tom and Jack," and at the same time looked at a box in the room, and as deponent now best recollects, nodded to it. The day after deceased's death, deponent was present at searching for the will, it was found in the said box, in a brown paper, tied with pack-thread and sealed, and two or three bank notes with it; the seal was torn off from the will at that time, but it was wrapped up within it.

2. Int. The first place searched was a bureau. 4. Int. Next place searched was deceased's trunk, and the box last. 6. Int. Deponent did not believe the deceased had cancelled the will, but Thomas Davies said he believed the will was cancelled, for Dr. Lee had told him so, and that it was not now of force.

8. William Stevens.—The deceased, about four years before his death, said he would make his will in favour of his nephews, and that they, and no body else should have his effects. The Whitsuntide before he died, deponent told him he was sorry to hear he was likely to lose some money; deceased answered, "I lose it, no, my nephews will lose it." A year before his death, he told the deponent he had made his will in favour of his nephews; the will was found in a wooden box by the deceased's

bedside, and the draft with it, and there was a paper in it that looked like a bank-note; the seal of the will was torn off, but it was wrapped up with it.

9. Judith Spencer.—Deponent knew deceased seventeen years; deposes to affection to nephews; has often heard deceased say they should be his heirs and executors. In a fortnight or three weeks before his death, he declared he had made his will, and left them what he had, and made them executors.

Clause in a letter from the deceased to his nephew John, dated Jan. 21st, 1749, wrote upon the death of Jane Evans's husband, in which he said she was young enough to go to service.

2d letter from deceased to John, dated 15th August, 1750, has these words: "It is no matter how little company you keep with your cousin Jenny and her sister, unless they were better."

Will read.

Witnesses for Evans.

1. William Jackson.—Has known deceased twenty years, he lodged and died at deponent's house. Evans and her husband came to visit the deceased, and he received them kindly. In Sept. 1751, the deceased was taken ill; believes he did not think himself in danger of death; deponent was present at the search for the will; they searched the box last, where the will was found; deponent saw no papers of consequence with it; his papers of moment were found in his bureau and trunk; they afterwards searched to see if they could find any other will, but found none.

2. Elizabeth Jackson.—Deceased lodged at deponent's four years before and to his death; he received Evans and her husband well; he did not seem to think he was in danger in his last illness.

3. Lawrence Smith.—Deponent first knew Jane Evans in 1749; her husband died in January, 1749, insolvent; she was forced to go to service. In July, 1751, deponent was at Barkway, and told deceased Jane Evans's condition, that she was forced to sell all her goods and go to service; deceased said, his nephews told him her husband had left her 500*l.* or 600*l.*, and seemed much surprised at finding her affairs were so bad, and said his nephews had deceived him, he would alter his will, and make Jane his executrix. On 11th August, 1751, deceased gave deponent and wife a letter for Jane Evans, and expressed concern for her, and said his nephews had imposed on him, and he had cancelled his will, and would make another, and Jane executrix, and then delivered said letter to deponent for Evans.

4. Frances Smith.—Agrees exactly with the last witness; says deceased cried at hearing of Jane's bad circumstances, and said his nephews had deceived him; said it was a pity she should go to service after having been so long a housekeeper, and expressed great desire to see her, and said, now he had found his nephews out, and he had cancelled his will, and would make Jane his sole executrix.

5. Robert Antrobus, gent.—Deponent was intimate with the deceased for a year before his death. A day or two after the deceased's death, Thomas Davies showed the deponent the deceased's will, which had the seal torn off. About two months before the deceased's death, he at Wortham's house at Royston asked deponent if he would come to Barkway if he should send for him; deponent said he would: the deceased then said, he had made his nephews his executors, but he would alter his will,

and made deponent promise to come when he should send for him; deceased several times after, and within a very short time before his death, told the deponent he would make a new will, and that the deponent should do it for him.

6. James Orlebar.—The day the deceased died, the deponent was at a search for the deceased's will, which was found with the seal torn off, and no papers of consequence with it.

7. Ann Phillips.—Says Thomas Davies told her there was a flaw in the will, for the seal was torn off.

Letter from deceased to Evans, dated 11th of August, 1751, says, "He begins to know his nephews;" expresses kindness for her.

*Dr. Simpson*, for Davies.—No particular instance of affection to the niece. First question, whether the will was cancelled by the deceased? Shall insist that it was not cancelled by him; but, secondly, if it was, he republished it by his declarations; settled intent to die testate, his nodding at the box where the will was, amounts to a republication. *Cotton and Cotton*, 2 Vern. 298. Deleg. *Slade and Burgoin* against *Dr. Friend* and *Lloyd*.

*Dr. Bellesworth*, same side.—The seal being kept with the will, it was not completely cancelled, though I believe it was torn off by deceased; his declarations show he considered it as his will, which amounts to a republication, and his delivering his keys to his nephews, is an act in affirmation thereof.

*Dr. Pinfold*, contra, for Evans.—'The will was clearly cancelled by deceased; no act done by him to revive it; parol evidence cannot revive a will that is once destroyed. The case of *Cotton and Cotton* has been denied to be law at the Delegates. Declarations alone not coupled with an act, cannot revive a will.

*Dr. Hay*, same side.—This republication depends entirely on parol; a will cancelled cannot be revived by parol. Stat. of Frauds, will cannot be destroyed without an act (*Stride v. Cooper*, 1 Phill. 334, [1 Eng. Eccl. Rep. 91,]); same danger of perjury if it can be restored by parol without an act. Swinb. part 9, sect. 16. Godolp. p. 25, when a will is destroyed by operation of law, it may be revived by parol, but when the testator has destroyed it, it is otherwise. In the case of *Slade and Burgoin* against *Dr. Friend* and *Lloyd*, the Delegates doubted whether the will was cancelled, and the parol evidence was only to explain the doubtful facts, and clear up that point; the declarations made by the deceased were drawn from him, and did not come *ex proprio motu*.

#### JUDGMENT.

SIR GEORGE LEE.

The will having been always in deceased's custody (a), I was clearly of opinion he cancelled it himself, and probably did it between the July and the 11th August, 1751, upon being informed that his niece's affairs were worse than he imagined; and this agrees with what he said to Antrobus about that time, concerning making a new will; the only question was, whether his declarations on his death-bed were sufficient to revive it again, and to operate as a republication; and I was clearly of opinion they were not, for none of them directly pointed at this paper,

(a) *Loxley v. Jackson*, 3 Phill. 128; *Wilson v. Wilson and others*, *ibid.* 552, [1 Eng. Eccl. Rep. 375. 467,]; *Colvin v. Fraser*, 2 Hagg. 191, [4 Eng. Eccl. Rep. 113,]; *Lillie v. Lillie*, 3 Hagg. 189; *Pinhallow v. Robinson*, *ibid.* notes, 190, [5 Eng. Eccl. Rep. 67. 69,]; *Hare v. Nasmith*, 1 Shaw. 73, S. C.

and it would be very dangerous to establish wills upon loose general declarations, contrary to apparent acts done by testators themselves. I therefore pronounced that the deceased was dead intestate, but gave no costs.

## ARCHES COURT OF CANTERBURY.

Hon. ROBERT HERBERT, Esq. v. HELYAR.—p. 452.

*Appeal from Winchester upon a Grievance, in admitting an Allegation.*

An allegation offered after publication, rejected.

STEVENS against WEBB.—p. 456.

In a suit for subtraction of tithes, a tender held to be sufficient.

BARTON against The Rev. Mr. ASHTON. (a)—p. 460.

*Upon a Motion.*

Articles admitted against a parish clerk: he appeals to the Court of Arches, and applied to the Court of King's Bench for a mandamus: not competent to him to proceed in both Courts; assigned to declare which he elects.

(a) Vide *supra*, p. 376.

## PREROGATIVE COURT OF CANTERBURY.

LETHES against EDSFORTH and KYFFIN.—p. 462.

The capacity of a testator established.

DR. *Pinfold*, for Lethes.—Thomas Edsforth, bachelor, died 31st January, 1752, made his will 30th January, 1752, and appointed David Lethes executor and residuary legatee, died of an inflammatory fever, left a brother, John Edsforth, and two sisters, Frances Kyffin and Eleanor Fish; gives 5*l.* a year annuity to each of his sisters, 100*l.* to his niece to be paid at her age of 21 years, and all the residue of his real and personal estate to David Lethes, the executor. Kyffin and Edsforth oppose the will; the only question is sanity; great intimacy with Lethes, who was the deceased's cousin, and disaffection to his brother. About nine in the morning of 30th January, Lethes sent to Mr. Barber, an attorney, to make deceased's will; Barber was a stranger both to deceased and to Lethes; deceased was butler to Lady Lawson; Lethes, Newman, and another present; Barber asked them if deceased was in his senses, they said yes, and then he talked with deceased, who at first

ordered 30*s.* a year to his sisters; Lethes told him it was too little, then he said he would give them 5*l.* but absolutely refused to give his brother anything, and then his niece being mentioned he gave her 100*l.*, he then gave Lethes the residue and made him executor. Barber explained the meaning of residue, and then Barber's clerk wrote the will, and it was read to the deceased and he approved it; the deceased wrote at first his name John instead of Thomas, but it being taken notice of, he said "pho! what a blockhead am I," and then wrote "Thomas Edsforth;" the three subscribing witnesses and another person were present all the time; Lethes acted disinterestedly, for he told Fish her brother was very ill, and advised her to go to him; the physicians and James say he was not sensible, but from instances they prove the contrary.

*Dr. Paul*, for Edsforth and Kyffin.—Will made at ten in the morning of 30th of January; no declaration in favour of Lethes before or after making it; declarations that he would provide for his brother; sending for Barber solely the act of Lethes; Barber asked deceased about his fortune; whole will made by interrogatories; at first said he would give his sisters 15*s.* a-year a-piece; was in convulsions, but yet said he was very well. The physicians say he was not sensible when they were with him about the time of making the will; his publication of the will was only repeating Barber's words, clear proof of total incapacity. The day before the will was made, he declared he would make none.

Witnesses for Lethes.

1. John Barber, Gent.—About nine in the morning of 30th January 1752, deponent was sent for to Lady Lawson's house to make a will for the deceased; the deponent went with Newman; never before saw deceased or Lethes; deponent asked the persons present whether deceased was sensible? they said "yes;" deponent asked deceased what this fortune was? he said he had an estate of about 21*l.* a year, and 300*l.* in money; deponent asked him how he would dispose of his fortune; he answered he would give 1*l.* 10*s.* a year to each of his sisters; Lethes saying it was too little, deceased said, "Let it be 5*l.* a year;" deponent and Lethes asked deceased what he would give his brother, he replied "Nothing," and seemed uneasy at his name being mentioned. William Newman put the deceased in mind of his niece, and the deceased said he would give her 100*l.*, and ordered it to be given to Lethes in trust for her; his brother was again named to him, but he said he would give him nothing; deponent told him a great part of his estate was undevised, and asked him to whom he would give the residue and make his executor; he answered "Mr. Lethes," separately to each question; the deponent explained to him the meaning of residue; the deceased said he understood it; then by the deponent's dictation, deponent's clerk wrote the will pleaded; deponent read it to him; deceased approved and then executed it, but wrote his name "John;" the deponent took notice of it, and the deceased then said "Pho! how could I be such a blockhead?" and then deceased said "I deliver this as my act and deed," having first altered his name; deponent bid him repeat "I publish this as my last will," and then deponent, Newman, and Davis witnessed it; the deceased was of sound mind, &c.

2. Philip Davis.—The deponent is clerk to Barber, and by his orders followed him to Lady Lawson's on 30th January, and there from Barber's dictation, who received the instructions from the deceased in the deponent's presence, wrote the will articulate; Barber read it to de-

ceased and he approved it; gives same account of execution as Barber; deceased appeared to be perfectly in his senses, &c.; deceased was a stranger to deponent.

3. William Newman.—The deponent was fellow-servant with the deceased; the deponent went for Barber at Lethes's desire; the deceased gave Barber instructions for the will; Barber asked the deceased several questions concerning his age and fortune; the deponent asked the deceased what he would leave his brother; he said "Nothing at all;" what would he give his sister Fish, he said "15s. a year;" Lethes said it was too little, and then the deceased said he would give his sisters 5l. a year each; he deposes to rest of instructions the same as the others, particularly to the deceased's giving the residue to Lethes, and making him executor; the deceased a second time said he would not leave his brother a farthing; does not remember that the deceased said anything on being told he had wrote his name wrong; proves execution, &c. and sanity at that time.

1. Int. On night of 29th January the deponent was with deceased; at two in the morning he was delirious, and at three was in convulsions, and was not quite sensible at six when deponent left him. 3. Int. About seven in the morning of 30th January the deponent told Elizabeth Mark, the deceased had been insensible. 4. Int. The deponent was sent by Lethes for Barber. 6. Int. Did not hear deceased say any thing when he wrote his name John. 7. Int. Verily believes the deceased was sensible when he made his will.

Witnesses for Edsforth and Kyffin.

1. Thomas James.—Knew the deceased for four years before his death; the deceased had great love for his brother and sister Kyffin; saw them with the deceased within a fortnight before his death; knows the deceased maintained his brother till his death, and was engaged to pay his house-rent; 30th January 1752 between nine and ten in the morning deponent went to the deceased, found with him Lethes, Newman, and a maid servant; the deponent asked him how he did; he answered "Indifferent," and smiled; the deceased knew the deponent; deponent said to Newman, "I think it is proper the deceased should settle his accounts," meaning some money the deponent had paid for him; the deponent went home for his book, and returned immediately; met Lethes on the stairs, and told him he had brought his book for the deceased to sign, and desired him to be a witness; Lethes said the deceased must do another affair first; the deponent went into deceased's room and found there Barber, &c. and deceased said he would have Lethes come in; Davies wrote the will from Barber's instructions who received them from *Newman and Lethes*, but before Barber directed his clerk to write any legacy he asked the deceased if it was to his mind, and he answered "Yes," but the deponent verily believes he was not capable of proposing, and he did not propose one single legacy but seemed quite insensible to the making a will, or understanding what he did; Barber read the will to the deceased, and asked him if it was to his mind; he answered "Yes," and smiled, but seemed quite senseless; the deceased wrote John as his Christian name; Barber told him of it, and after ten minutes he wrote something near the word John; he appeared quite insensible; the deponent asked the deceased if he knew what the accounts were between the deponent and him; he answered "Yes," but behaved as before, senselessly; the deponent knew the deceased did not know the accounts,

and therefore believing him to be insensible, did not ask him to sign them; about ten minutes after the will was finished, the physicians came, and seemed to have no hopes of him.

1. Int. Believes the deceased had greater love for his brother and sister than for Lethes. 6. Int. Brother often disobliged the deceased, but the deceased had forgiven him. 16. Int. The room was unlocked, and the servants went backwards and forwards. 20. Int. The deponent applied to Lethes to pay him the debt due from deceased, if the will should be good, but the deponent thought it was not.

2. Elizabeth Mark.—The deponent was fellow-servant to the deceased for sixteen years; heard the deceased say, the winter before he died, he would leave his brother an annuity; he had affection for his sister Kyffin; at seven in the morning of 30th January, the deceased was very ill, but he said he was very well, and laughed; the deponent sent for Lethes, and then Dr. Clifflin was sent for; deponent was not present when the will was made, but he had a paper in his hand when the deponent went into deceased's room about ten that morning, and heard him say "This is my last will and testament;" verily believes he was not capable of making a will.

2. Int. The deceased and Lethes were cousins, and the deceased expressed great kindness for him. 16. Int. Nobody was hindered from going to the deceased while the will was making. 17. Int. Lethes sat up with deceased on the night of 30th January.

3. Mark Warkup.—Within six weeks of the deceased's death, deponent heard him express great kindness for his sister Fish, and say he would provide for his brother, but would leave the money in trust for him; on 30th January at nine in the morning, Lethes told the deponent the deceased was dying, and at same time said he had sent for a lawyer to make the deceased's will; the deponent went up to the deceased, and asked him how he did; the deceased, in a foolish, smiling way, answered, "Very well," but seemed insensible; the deponent then said to Lethes, "The deceased cannot be capable of making a will;" deponent said to the deceased, "Rouse up, you are going to make your will;" the deceased answered, "Yes," but did not seem in his senses; on 29th January, the deponent asked the deceased to make his will, but he absolutely refused, and said he would not till midsummer; he was then sensible.

13. Int. The deponent asked the deceased if he should sit up with him that night; he said, "With all his heart;" deponent has always declared that the deceased was insensible.

4. Michael Heron.—The deceased showed great love for his brother and sisters; about fourteen days before his death, he told the deponent he would provide for his brother.

5. Margery Rule.—Affection for brother and sisters; the deceased maintained his brother to his death; at eight in the morning of 30th January, the deponent went into the deceased's room, and found him singing; he seemed to be convulsed; Dr. Clifflin was with deceased between nine and ten that morning; soon after Barber came there, deponent heard Barber read to the deceased, and asked him if he approved of it, and he said, "Yes."

1. Int. The deceased and Lethes great friends. 6. Int. Has heard the deceased complain of his brother, but knows he had a regard for him.

13. Int. The deponent said to deceased, "I am sorry you have not left



your poor brother any thing;" he answered, "He will *have*," and smiled. 14. Int. The deceased wrote letters to Lethes.

6. Burroughs Nash.—The deceased offered to be security for Mr. Kyffin for a rent of 65*l.* a year.

7. Robert Taylor, M. D.—About ten in the morning of 30th January, the deponent visited the deceased as a physician; he was then delirious, and apparently dying, and deponent verily believes he did not know what he said and did; the deponent staid with him three or four minutes; visited him again in the evening, and then he was in the same condition, and incapable of making a will, &c.

10. Int. The deponent infers incapacity from what the deceased said.

9. Int. Respondent thinks it possible, but very improbable, that the deceased should be capable of making a will between the times the deponent saw him. 16. Int. The deponent advised Lethes to make up this cause.

8. John Clifflan, M. D.—The deponent attended the deceased three weeks; on 30th January, about nine in the morning, Lethes told the deponent he believed the deceased was dying; the deponent went to him; sometimes he spoke sensibly, and at others not, but believes he was not capable of making a will; the deponent saw the deceased three times that day; at all times he was incapable.

6. Int. The deceased expressed affection for Lethes.

Witnesses for Lethes.

1. Margaret Dalton.—The deponent was fellow-servant with the deceased; never heard him express regard for his brother or sister Kyffin; the deceased was angry at his brother's coming to him in his illness; the deceased and Lethes were cousins; believes the deceased had greater regard for him than for his brother or sisters; the deponent, about seven in the morning, saw the deceased; the deponent at first thought him not sensible, but afterwards he talked very sensibly; the deceased's brother came while the will was making; the deceased saw him, and the deceased then seemed in his senses, and was so about three in the afternoon; between two and three in the afternoon of 30th January, Fish and Kyffin were with the deceased, and Kyffin then asked the deponent, "How long has my brother been out of his senses?" the deponent answered, "I did not know he was out of his senses;" the deceased being asked if he knew what they said, he replied, "Yes," and seemed perfectly sensible.

2. Joyce Head.—Deposes that Lethes, on 29th January, told Fish her brother was very ill, and advised her to go to him and get him to make a will; she replied, "Do you, Mr. Lethes, for you have more influence over him than I."

3. Joseph Jefferson.—Has heard the deceased damn all his family, and heard him say, within six months before he died, that his brother was a good-for-nothing fellow; he had a great affection for Lethes.

4. Moses Paul Juliott.—The doctor's prescriptions took up some hours in making.

Inventory.

The deceased had a real estate of about 20*l.* a year, one-half of it copyhold, which devolves on his brother.

JUDGMENT.

SIR GEORGE LEE.

Upon the whole evidence, I was of opinion that the deceased was in

his senses when the will was made, and gave sentence for it, but without costs.

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**TIMBRELL against RICE and WELCH.—p. 471.**

A creditor entitled to an inventory of the effects of an intestate.

JANE TIMBRELL, who is a creditor in 20*l*. of the estate of James Appleton, deceased, has called Rice and Welch, executors of Margaret Appleton, who was administratrix to her husband, James Appleton, with his will annexed, and residuary legatee, to give in an inventory of James's effects.

*Dr. Jenner*, for Rice and Welch—Said that James Appleton made his wife residuary legatee for life only, remainder, after her death, to be equally divided between Jane Timbrell and others, and made said Jane Timbrell and others executors, who renounced. That Timbrell may take probate of James's will, and then may sue the executors of Margaret for the effects; but as Margaret was only administratrix to her husband, there was no privity continued from James to Margaret's executors, and therefore they were not liable to be called to give in an inventory of James's effects.

JUDGMENT.

SIR GEORGE LEE.

But I was of opinion Timbrell was entitled to have a constat of James's estate, and as the executors were in possession of it by their executorship to Margaret, they were liable to give in an inventory, and accordingly, I decreed that they should exhibit an inventory of James Appleton's estate, and condemned them in 1*l*. 6*s*. 8*d*. costs.

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**HELYAR v. HELYAR. (a)—p. 472.**

42. The statute of frauds does not prohibit the introduction of parol evidence, to prove the fact of a will having existed subsequent to the will found on the death of the alleged testator. Established by proof that a latter will, with a different executor which did not appear, had been made.

The execution of a second will of a different purport from the first, is by law a revocation of the first, though the second may not appear.

It is a presumption of law that a will never out of the deceased's custody, and not appearing at his death, has been destroyed by the deceased.

Some act of revival is necessary to republish a will which has been destroyed by the making of second will of a contrary tenor.

*Dr. Pinfold*, for William Helyar, Esq.—Robert Helyar, Esq. died on

(a) An authentic report of this case has long been a desideratum to those who take an interest in questions of testamentary law. It involves the consideration of some difficult and much-controverted points; and perhaps no case has been more frequently cited or so much misunderstood. The judgment, also, is highly creditable to the learning and judicial attainments of Sir George Lee, and the perusal of it will satisfy the reader of the erroneous impression of those persons who have maintained that the principles laid down by Lord Mansfield, in the case of *Goodright* on the demise of *Glazier v. Glazier*, 4 Burr. 2512, are diametrically opposed to those on which the judgment in this case is founded. In point of fact, the circumstances of the two cases are widely different, and the judgment in each instance is a legal conclusion deduced from the circumstances of the particular case.

25th June, 1751, a bachelor; left Mrs. Johanna Helyar his sister, and William Helyar, Esq. his nephew, and two nieces, Martha Cosens and Mary Pitcher, who are cited, but do not appear; made a will, dated 12th February, 1742, duly executed and attested by three witnesses; it contains real and personal estate. The deceased had an estate at Newton, in Cornwall, which was left by his sister, Lady Coryton, to him and his sister Johanna. By this will, he leaves his sister his moiety of that estate, and 2000*l.*; he had another estate at South Taunton, in which the nephew had a share; this estate he leaves to his nephew, and makes him executor and residuary legatee. This will was drawn by Mr. Newman, an attorney. Deceased, at the time of making it, declared he left his estate to his nephew to preserve it in the male branch, and desired Newman to persuade the nephew to make his will also, and give his estate to the deceased; he did so, and both wills were dated the same day, and duplicates made thereof and exchanged. The factum of the deceased's will and his sanity are admitted; but the sister opposes the deceased's will on this point, viz., that on 17th December, 1745, the deceased made and executed another will, and therein appointed his sister executor and residuary legatee, and that he did not name his nephew in it; there was in it a clause revoking all former wills. Vincent Darley says he made a will for the deceased at that time, but cannot say who was executor, or whether there was a revocatory clause; the other witness speaks only to execution. The deceased took this last will into his custody, and it has not been seen since, and was not in being at his death. The deceased was in Cornwall the winter before he died, but died at South Taunton; he carried a hair trunk with him thither, which was placed in his room, and he kept the key in his pocket. He died of a dropsy, his sister and nephew were both with him. His bureau and rooms were sealed up within two hours after his death. Two persons of a side were appointed by each party, who searched for a will the next morning; the seals were found entire; they first searched the hair trunk, and there found the will dated 12th February, 1742, which is propounded. The deceased was engaged in a chancery suit relating to his estate at Newton; the will was tied up with papers relating to that estate, and there was money, &c. in the trunk. The sister said there must be another will. They then sent to Newton to seal up his study there, and likewise to London to seal up the deceased's chambers in the Temple. The same persons who searched at Taunton searched at Newton, but found no will of the deceased; but, in an open trunk in his study at Newton, they found the duplicate of William Helyar's will with papers of no consequence; search was afterwards made at the deceased's chambers, but no will was found there. Pleas of affection and disaffection have been given in on both sides. It is suggested that the deceased was angry with his nephew for marrying Miss Weston in 1743, but it will appear he was afterwards well satisfied therewith. In 1744 and 1745, he was godfather to William's children, and they had transactions together upon money matters and accounts. In May, 1751, they met and settled accounts, and the deceased ever received William with great kindness. In 1751, the deceased was about buying an estate because it was near his nephew's; he wrote letters of affection to William. We have pleaded the deceased's dislike to his sister; she and William were always upon bad terms. Deceased and his sister did live together in Cornwall, and corresponded when separate. The points are, 1st,

Whether our will is revoked? 2dly, Whether there is not evidence of acts done by the deceased which will amount to a republication?

*Dr. Smalbroke*, same side.—The nephew, after his marriage, made dispositions of his estate contrary to his will. They have pleaded circumstances to infer that John Shury, the deceased's servant, took away the last will after the deceased's death.

*Dr. Clarke*, same side.—The single question is, whether, under the circumstances of this case, the last will has revoked the former.

*Dr. Paul*, contra, for Mrs. Johanna Helyar.—The deceased was a lawyer. We do not dispute the factum of the will dated 12th February 1742, the design was to exchange wills. William, the father of the deceased, died in September 1742, he left his money to the deceased, but his real estate went to the nephew. Both wills were made with the prospect of gain. In 1743, William married contrary to the deceased's liking; the deceased told his nephew thereupon, "that he had made his will and given him 40,000*l.*, but damn me if you shall now have a farthing." Johanna made her will in June 1745, and appointed deceased her executor and residuary legatee. Deceased declared he had made his will in the country, which was the will of 17th December, 1745. Darley, the writer of it, swears he believes the sister was executrix and residuary legatee. The nephew knew there was a second will; on the search, declared he was sure there was another will, and said he knew where it was. William made several wills after his marriage; so that the exchange of wills was at an end. The deceased and William had several quarrels. The deceased never went to the nephew's house after his marriage; never saw his wife or any of his children. Just before his death, the nephew came to him and he was angry thereat. The deceased wrote very affectionate letters to his sister; the letter of 19th January, 1744, shows he was not godfather to William's child from affection. The case will turn chiefly on the revocation by the second will. Great reason to suspect the deceased's servant, John Shury, had taken the last will out of the deceased's chambers. It is clear, in point of law, that the execution of a later will destroys a former, and that the former cannot be revived without some new act, and the practice has been so.

*Dr. Simpson*, same side.—Questions of law—the revocation by a latter will; no proof that the second will was cancelled; if it was, acts were done to revive it.

On 12th Feb. 1742, William and Newman went to the deceased at Newton to settle accounts. The deceased then made a will, merely with a view of William's doing the same; the deceased would not execute his will till his nephew had first executed his. In August, 1743, William and Newman went again to Newton, and then got from the deceased the family settlement, in order for William's making his marriage settlement. Mr. Bennet swears that the deceased told him that William denied any intention of marrying Miss Weston, and proves declarations of deceased's disaffection to William, and that William should have nothing from him. The deceased asked Bennet if he could not alter his will by codicil. The deceased expressed great joy at his sister's making her will. Darley proves factum and execution of the second will and instructions, and Honor Pearse proves execution, and that the deceased took it into his custody. Subsequent declaration that he had made such will, and full proof that William declared after the

deceased's death, that he knew there was another will, in which Johanna was executrix, and said he knew where it was, but would not tell. There is full proof of a second will executed, but no proof that it was cancelled by the deceased. Upon the deceased's death, the key of the hair trunk was taken out of his pocket, and given by Webber to Shury, two hours before the doors were sealed up, and the next morning the key was found in the trunk, and therefore Shury must have been at it before the doors were sealed up. Shury was the last person in the deceased's study at Newton, when the deceased left the place, and a trunk was found there open, from which probably Shury took the will pleaded. Search was made at the temple for a will; the doors there were sealed up, but the laundress had free access for some days before; Shury had one key of the chambers which he kept for a fortnight. The third key was found by Shury in a drawer at the chambers, which had been fully searched, and no key then found. The will pleaded was found among deeds which concerned Johanna. It is improbable the deceased should put it there, when it was a will to defeat her. A good deal of evidence attempted to prove the deceased's affection to William; William seldom saw the deceased, only when they had accounts concerning their lime-works to settle. Shury sent for William when the deceased was ill, without his privacy. Divers declarations from the deceased of his dissatisfaction at William's marriage. In 1747, great quarrel between the deceased and William on settling their accounts, which the deceased spoke of to his death. In September, 1749, the deceased spoke very slightly of William. The deceased and William's family never visited, and the deceased never went to William's house. Affection to his sister appears from the deceased's letters, and from full evidence. The grand point is the question of law.

*Drs. Hay and Bettesworth*, same side.—We insist that the will pleaded was put into the trunk by Shury.

Witnesses for William Helyar.

1. John Newman.—Proves instructions in writing from the deceased for making the will of 12th February, 1742, and his drawing it and a duplicate pursuant thereto; the deceased approved and executed it in the presence of the deponent and John Cox and William Wells, and a duplicate, and they attested them; the deceased was then of sound mind, &c.

2. Int. The deceased said he wished his estate to go in the male line, and he desired the respondent to speak to William and get him to make his will and give his estate to the deceased. The respondent did speak to William, and he made his will, in which he gave all his estate to the deceased except a few legacies, and made the deceased executor and residuary legatee. The deponent drew wills for both; the deceased delivered duplicates of each, which the deponent made, and William executed his will and duplicate, and sent one part to deceased; and then the deceased executed his will and duplicate and sent one part to William. William sometime after married, and on the birth of a daughter made a new will. 3. Int. William settled part of his estate on his marriage, and he has since made several wills. 5. Int. In a day or two after the deceased died, upon search the will pleaded was found in the deceased's trunk, no will was found at Newton or at the Temple. 6. Int. The doors of the chambers at the Temple were sealed on behalf of both parties. 7. Int. The interests of the deceased and William under

each others wills were nearly equal. 9. Int. The deceased often travelled near William's country house.

2. John Cox.—Proves execution of the will pleaded, and capacity.

3. William Wells.—The same.

9. Int. William's house is about ten miles out of deceased's road from his own house to London. 10. Int. William went to the deceased, but the deceased never visited him or his wife.

The will read.

Witnesses for Johanna Helyar.

1. William Bennet, Esq.—The deponent first knew the deceased in 1789, and was concerned for him as a lawyer; the deceased was a barrister at law; great affection between the deceased and his sister Johanna; Lady Coryton their sister left Newton to the deceased and Johanna as tenants in common, and they lived there together; the deceased's father made him executor, and gave him most of his personal estate, and his real estate descended to William; about 1743 the deceased told the deponent that William solemnly denied he was going to be married to Miss Weston, but said that a day or two after William asked for the deceased's mother's marriage settlement, and that he had let him have it, and the deceased said to William, "I have made my will and given you 40,000*l.* but damn me if you shall have a farthing of it;" and asked the deponent if he could not alter his will by a codicil.

2. James Willis.—Proves affection between the deceased and the producent; believes it lasted till his death; they were joint owners of Newton; after William's marriage the deceased said William had very much offended him by not consulting him on his marriage—adding that he had provided for him very largely by his will, but he was resolved he should not now have a penny.

7. Int. Respondent is solicitor for the producent in a cause against William in chancery.

3. Elizabeth Clements.—The deponent was often at Newton with the deceased and the producent; they lived together in perfect great harmony; the deponent heard the deceased speaking of William say, "Since he is married to Betsy Weston, let me be damned if ever he has a groat of mine;" the deceased's sister, Mary Helyar, died in October, 1745.

4. Vincent Darley, Gent.—The deponent knew the deceased ten years; Lady Coryton died about 1740, and left her estate at Newton to the deceased and Johanna; the deceased and she lived in perfect harmony together; on the 17th December, 1745, the deceased desired the deponent to draw a will for him, and as the deponent best remembers, he drew it from verbal instructions then given him by the deceased, and the deceased approved it, and then the deponent engrossed it, and the deceased approved and executed it in the presence of the deponent, Honor Pearse, and Elizabeth Cornish, now dead, who attested it; the deceased was then of sound mind, &c.; the deponent does not remember that the deceased ordered a revocatory clause to be inserted, but believes there was such a clause in the will because it is usual; he cannot positively say Johanna Helyar was executrix and residuary legatee, but to the best of his remembrance and belief, she was both; the deceased took the will into his own custody; he does not remember the particular legacies.

1. Int. 2do loco. Does not remember that any person was present at giving the instructions for the said will, or at the reading of it to deces-

ed, or execution, except the subscribing witnesses; the deponent never saw the will afterwards.

5. Honor Pearse.—Deceased and producent kept house jointly at Newton; deceased was absent from Newton two years as she believes, because his sister could not be there; great affection between deceased and producent to his death; kind letters passed between them; deceased's father left him his personal estate, and his real estate went to William; has often heard the deceased express displeasure at William's marriage; Mary Helyar died 29th October 1745; he proves execution of a will in December 1745 by deceased, in presence of deponent, Darley, and Elizabeth Cornish, since dead; the deceased declared it to be his will and they then witnessed it; about four months before the deceased died, the deponent heard him speak of the quarrel between him and William in 1747, and said William said to him, "I wish I had a sword, and I would run you, sir, through the guts;" mentions expressions of dislike to William.

4. Int. Deceased was six weeks at Newton when his sister was not there. 3. Int. 2do loco. Deponent did not hear the said will read, or instructions given for it; does not know the contents of said will of December 1745; 9. Int. 1mo loco. Producent would not see William when he was at Newton.

6. Neal Ashby, Gent.—There appeared to be good harmony between the deceased and his sister; deceased expressed displeasure against William, and talked about William's getting his writings from him; in June 1745 Johanna made a will, in which she gave her moiety in Newton to the deceased, and the greatest part of her effects; the deceased was much pleased thereat; a fortnight or three weeks after the deceased told the deponent he should make his will, and afterwards at London deceased told deponent he had made his will in the country.

7. Int. Soon after the deceased's death the deponent and Mr. Gapper sealed up the deceased's study in London, and a padlock was put upon the door; the deponent had the key of the padlock, and Gapper of the door. 10. Int. Deponent was present at the search for the will at deceased's chambers; a strict search was made, but no will was found; the doors were found sealed up as they were originally, when they came to search; Respondent has no suspicion that the doors had been opened.

7. Neale Webber.—Deponent was the deceased's attorney; deceased and his sister behaved kindly to each other; Sunday before deceased's death (who died on Tuesday) William came to deceased's house, and deceased was very angry with one Easterbroke for going for William without deceased's knowledge, and said to him, "How dare you go for him without my knowing it."

3. Int. Respondent did not observe that deceased behaved uncivilly to William. 4. Int. Respondent found a key in deceased's pocket at his death and gave it to John Shury.

8. Sarah Astal.—Deponent is servant to the producent; deceased and producent lived together in great harmony and corresponded when absent; deceased died at Taunton; deponent was present the next day when search was made for his will; will, dated in 1742, was found in a trunk in a closet in deceased's room, and William then said "This is one will, but I have another;" deponent said the producent knew of one made by Darley five or six years ago; William said he did not mean

that, but meant one made three years ago, in which his aunt the producent was executrix.

14. Int. John Shury was present at such search; the respondent went to tell the producent of the will found.

9. William Hole.—Great affection between deceased and producent; kept house at Newton jointly; before William's marriage often heard the deceased express great dislike of it, and the same since, and he would not see him for several years after, and believes deceased was never reconciled to him; and deponent has heard deceased complain of William's behaviour to him till within a short time of his death; deponent was present at finding the will, and William then said "I am very well satisfied there is another will, and I know where it is;" some body then present said, "Sir, if you know where it is, you may save us the trouble of going into Cornwall to look for it," he replied, "Sirs, you may go look for it in Cornwall, and if you do not find it, then I will tell you where it is."

12. Int. The day the deceased died, all his chests, &c. were sealed up, and the next day it was agreed that search should be made; first in deceased's closet in an hair trunk; there the will was found; in said trunk there were some papers of no consequence, and some relating to a cause in chancery; both William and John Shury said there was another will.

13. Int. The next day they went to Newton to search for a will, but found none.

10. Amos Dridge.—Deposes to affection between deceased and producent, and joint house-keeping; the will pleaded was found in a bundle of papers in a hair trunk; and William then declared there was another will made by deceased a few years before, and said if they did not find it in Cornwall he would tell them where it was, but would not tell them then, though pressed.

11. John Hood.—Deceased and producent always behaved with great affection towards each other.

12. Grace Verrier.—The same. Has not been with them together in company since the year 1742.

13. John Hay.—Deposes to great affection between deceased and producent; in 1750 deceased expressed great disaffection at the quarrel between him and William in 1749.

14. John Hicks. Deceased and producent kept house jointly; they behaved with very great affection towards each other, and believes it continued to his death.

15. Countess of Clancarty.—Deponent was often in company with deceased and producent, and they appeared to have, and deponent believes had, very great affection for each other; producent seemed greatly alarmed at deceased's illness, and she would have gone to him, with a rash on her, but deponent advised her not to go then, but she did go soon after.

10. Int. Diligent search was made for a will at deceased's chambers, but none was found; the doors were found sealed up.

16. John Damarell.—Deceased and producent lived in good friendship, and jointly kept house at Newton; does not know that the deceased disliked William's marriage. In 1747, deceased and William met to settle accounts, and no dispute happened about the accounts, but in the evening a quarrel arose between William and deponent, and William insisted that the deponent should ask his pardon: accounts, in



May, 1751, were settled between William and deceased in a very friendly manner.

1. and 4. Int. Deceased was very little at Newton. 12. Int. In an hour after deceased's death, his closet, &c. were sealed up; in the trunk with the will was a book of accounts of all deceased's securities, &c.; deceased was careful of said trunk.

1. Int. 2do. loco. On 23d September, 1749, did not heard of any will lately made by deceased. A dispute arose on that day between deceased and William, about some interest money, but deponent heard nothing said of a will. 2d. Int. Deceased in 1751 received William very friendly; believes deceased had William's interest very much at heart, and did not intend to disinherit him. 5th. Int. Webber declared the deceased was in danger, and therefore William was sent for.

17. Elizabeth Damarell.—Deposes to affection; deceased told deponent that, in 1749, William said to him, "if I had a sword, I would run you through the guts."

18. Christopher Symmonds.—Deponent was coachman to deceased; he and deponent lived affectionately together. Easterbroke went to acquaint William that deceased was very ill, and fetched him; deceased asked deponent who sent for William; deponent said he did not know; deceased replied, "Nor I neither," and seemed to be in no hurry about his coming.

1. Int. 2do loco. Deponent never attended the deceased in London. Witnesses for William Helyar.

1. Clement Cattrell.—In their father's lifetime deceased and Johanna quarrelled.

191. Int. William is passionate.

2. John Cox.—Deceased and Johanna did not seem to live in a friendly manner; has heard him talk to his sister Mary, but not to Johanna; deponent has reason to believe deceased approved of William's marriage, for he kindly inquired of deponent after William's wife.

18. Int. Deponent never saw deceased at William's house. 24. Int. Does not know deceased ever visited William, or ever saw his wife and children. 44. and 45. Int. In May, 1751, William went to deceased's, but deceased kept his room, and deponent did not see him. 19. Int. 2do loco. Has not seen deceased and his sister together since the death of their father.

3. William Alter.—Deponent never observed any affection between deceased and Johanna.

19. Int. Has not been in company with them for ten years.

4. John Clinick.—In their father's time deceased and Johanna did not seem to agree.

19. Int. Has not seen deceased since his father's death.

6. Phillis Cox.—Never saw any thing but disagreement between deceased and his sister Johanna; has heard and believes deceased and deponent never visited.

19. Int. Has not seen deceased and Johanna together since their father's death.

7. Thomas Taylor.—In March, 1751, deponent went to deceased about selling him an estate near to his nephew's; deponent said he supposed deceased intended it for his nephew; he replied, "Probably they may go together."

1. Int. 4to. loco. Shury brought deponent a paper, and asked him

if that was not the conversation between deceased and deponent; and deponent said the paper was too full. 2. Int. Respondent refreshed his memory by frequently talking with Trist before Shury came to respondent.

8. Rev. Mr. Daubney.—Deceased died at seven in the morning, and soon after the closets, &c. were sealed up till next day. Never heard deceased visited William's family.

9. John Mayhew.—Deponent, servant to William fourteen years, was with him at deceased's house when deceased died; deponent went to Newton to seal up deceased's study.

10. Int. Never knew deceased visit William's family.

10. John Damarell.—Believes it was deceased's intention his estate should go in the male line; deceased was only five times at Newton after his father's death; on 23d September, 1749, deceased and producent settled accounts, and producent having borrowed money of deceased at 4 per cent. but conditioned to pay five if the interest was not paid by a certain day, some words arose between deceased and producent thereupon; in September, 1750, deceased told deponent he had sent for William to come and settle accounts; in May, 1751, William came, and they behaved very friendly; deceased carried all his securities to his house at Taunton, which belonged to him and William; on the Friday before deceased's death, Webber declared he was in danger. The day before the deceased died, he took the air in his coach with Shury; deceased always carried a hair trunk with him in which the will was found; search made for a will next morning after deceased died; the closet first searched; the seal of the closet door unbroken, and in the same state as when first sealed; his trunk was first searched as the most likely place to find deceased's will; and the said trunk being locked, the key was brought, and it was unlocked, and several papers in a cause, and accounts for many thousand pounds, were found with the will; the will was carefully tied up with papers of moment.

38. Int. The will was delivered to William, who then said there was another will; deponent apprehended he meant the duplicate. 11. Int. Deceased at first disapproved William's marriage. 116. Int. Believes the doors were sealed within two hours after deceased's death. 186. Int. Never heard deceased made any will after this, except one made by Darley. 191. Int. Respondent did not observe but that deceased behaved as a kind brother to his sister. 3. Int. 2do loco. Respondent did not give William any just cause to be angry with respondent in 1747; does not know who took the will out of the trunk. 8. Int. The will was lodged with respondent. 9. Int. Respondent delivered the will to William without consulting Johanna.

11. John Newman, gent.—When deponent made will of 12th February, 1742, deceased declared his estate should go in the male line; deponent has often heard deceased speak very disrespectfully of Johanna; deceased told deponent he had a great love for his nephew, and thought his estate should go in the male line to preserve the family, and gave the deponent instructions for the will pleaded, and then said he thought his nephew would do right to make his will, and give his estate to him if he survived, and desired deponent to speak to him about it, and then said his sister Johanna was of a very unhappy temper, and asked if the quarrel between her and William was made up; deponent spoke to William, and he ordered deponent to make his will accordingly; deceased express-

ed great affection to his nephew, when he made the said will. In August, 1743, William went to see deceased at Newton, and deceased used him very kindly, and no discourse then passed about William's marriage; Johanna was in the house, but would not see William; in January, 1743, William married Elizabeth Weston, and settled on her an estate of 300 guineas a year, and the settlement was not made from the family deeds; does not believe any of the family deeds were in William's hands; in September, 1747, there was a dispute between deceased and William about interest money, but William did not behave with any indecency to deceased; a quarrel in the evening between William and Damarell; he believes the deceased did not hear of said quarrel till next morning; deceased and William parted very good friends the next day; a short time after deponent talked with deceased, and showed how the quarrel began, and he was satisfied; in May, 1751, deceased was uneasy lest producent should not come to him, and bid deponent send for him; deceased received him with great affection, and inquired after his family very kindly; has often heard deceased declare his approbation of William's marriage; in 1744, William had a daughter born; the deceased excused himself, but afterwards stood godfather, and deponent was his proxy; in 1745, deceased was godfather to another child of William's; about a year after William's marriage deponent told deceased what settlement William had made, and he approved of the settlement, and said the estate would go in the male line as he would have it; in February, 1749-50, deceased inquired after William and his family, and said he had not been to see them, because it would displease Mrs. Johanna, but he would come soon; and deceased wrote down the names of William's children, and drank their healths and their mother's, and bid deponent tell William he desired he would give his children a good education; deponent said, "Then I hope you will take care of their fortunes;" he replied, "*My nephew has little else to mind but their education; there will be enough for them.*" Agreed the closet should be first searched; the door was found sealed; the hair trunk was locked, and the key thereof was brought, and it was then unlocked, and the will pleaded was found, with papers of accounts and in causes, &c.; deponent wrote to Ashby to know if he had any will of deceased's, and he wrote to Mr. Gapper to go with Ashby to seal up deceased's chambers; they searched at Newton for a will; found the study sealed up; no will there; deponent present at search in the Temple; study door sealed; no will.

14. Int. Deponent has made three or four wills for producent since 1743. 16. Int. Immediately after his son's birth, William made a new will. 26. Int. Believes deceased never saw William's wife or children. 30. Int. Cannot tell whether producent and deceased saw one another, between September, 1749, and May, 1751. 69. Int. Says no deeds were delivered by William, or deponent, in August, 1743. 90. Int. When the chambers were searched, deponent does not remember what was said about a third key. 79. Int. Respondent has from producent 5*l.* a year for looking after the alms-houses at Coker, and the poor have the rest of the estate.

12. Elizabeth Davis.—Deponent was laundress to deceased at his chambers, and had the keys of his chambers; deponent received a letter from Shury, dated 25th June, 1751, informing her deceased was dead, and that Ashby and another person would come and seal the doors; they came while deponent was reading the letter, and sealed the doors,

and deponent carried away the keys, and a day or two after a new padlock was put on, and Ashby had the key, and afterwards Ashby came a third time and took away deponent's key, but from the first the door continued sealed up; some time after, deponent attended at the search for a will, and the study door was, when they came, found sealed up as at first.

11. Int. 2do loco. Respondent was not applied to to deliver the keys of deceased's chambers. 19. Int. Does not believe any person clandestinely entered the deceased's chambers.

13. Robert Gapper, Gent.—Deponent present at search for a will at deceased's chambers; when they came, the outer door of the chambers and study doors were sealed up; no will found.

2. Int. John Shury was there, but did not assist in the search. Exhibits read.

Letter marked A, dated 26th March, 1751, from the deceased to Newman, says, "I have brought up all the deeds relating to Mr. Helyar's mother's settlement."

Letter B, from deceased to William, dated 6th September, 1750, says, "He will do any thing to serve him; service to his family."

C, ditto, dated 1st October, 1744, "Service to William's wife," letter on business.

D, ditto, 8th July, 1746, the same.

E, ditto, June 9th, 1747, the same.

F, ditto, August 2d, 1749, the same.

G, ditto, March 14th, 1748-9, the same.

H, ditto, November 2nd, 1750, same. "Shall be ready to assist him in every thing."

I, ditto, dated 13th November, 1744, about being godfather to William's child.

K, ditto, dated November, 1744, same.

L, to Newman, dated November, 1744, to be his proxy.

M, to William, on the same subject.

Witnesses for Mrs. Helyar.

1. Sarah Astal.—The producent went out with the deceased in his coach; deceased, while she was in town, wrote every week to her; producent rose early, deceased late, and therefore at Newton they did not breakfast or sup together; they kept house jointly at Newton; deceased had great regard for producent; gives little instances of deceased's complaisance to his sister; she went down to deceased in his late illness; on Sunday before deceased's death, William came to deceased's house; he lay in a bed without curtains, and sent four miles for his wine; the deceased, in going to his coach the day before he died, passed by and saw William, but took no notice of him; it was more than two hours after deceased's death that the closets were sealed up; at time of making the search at Taunton, Shury found the key of the London study; Shury refused to deliver that key to producent; Shury gave producent a particular account of what money was in the hair trunk before the search was made for the will; when will was found, William immediately declared he knew there was another will, in which his aunt was executrix, and then deponent went out of the room to tell the producent.

2. William Hole.—When William's health has been drank to deceased, he expressed displeasure; deceased always showed great affection for his sister, and they corresponded by letter when absent; deponent present

at search for will at Newton, and Newman was present, and readily turned to the deeds, and said deceased would not let William have a certain deed, which said Newman then looked on, lest he should sell the estate; deceased, within a month of his death, spoke slightly of William and his family; in deceased's study at Newton, in an open trunk, a duplicate of William's will was found; the windows of the study were open; Shury had access to deceased's hair trunk; the key was in it when they first came to search for the will; producent had no seal put, on her part, on the study at Newton.

3. Amos Dridge.—Speaks to affection to producent; in study at Newton, Newman said the deeds in a certain drawer belonged to an estate he named; never heard deceased speak disrespectfully of the producent; the duplicate of William's will was in a trunk in the study at Newton; no papers of consequence with it; the key was in the hair trunk at the time of the search, and deponent saw it in the trunk when he first came into the closet; Shury, before the search began, declared how many guineas there were in the trunk; the will was found by Shury.

4. Honor Pearse.—Deceased seldom spoke of William, but when he did, he always spoke of him in a slighting manner; the deceased and the producent dined together at Newton, though they did not breakfast or sup together; deceased ordered several repairs to be done at Newton the last time he was there; never observed but that deceased had great regard for producent; deceased corresponded with producent very affectionately; deceased would not come to Newton but when producent was there; producent did not see William but when he was at deceased's house at Newton; duplicate of William's will found in deceased's study at Newton; no seal put on study at Newton on behalf of producent.

5. Henry Pontglass.—Deceased and producent behaved kindly to each other.

6. Rev. John White.—Deponent often at Newton; has often heard deceased speak disrespectfully of William; never heard him speak otherwise; producent bears a very good character.

7. John Richards.—Has often been present with deceased and producent; they behaved kindly to each other; believes they loved one another.

8. Christopher Symonds.—Deceased sent his coach for his sister when she came from London to him; had affection for her; William came to deceased's a week before deceased's death, and continued there to his death, and deceased was two days before he would see him.

9. William Crabb.—Knew deceased and producent ten years; they behaved in a friendly manner to each other.

10. John Hicks, Esq.—In September, 1749, deponent was at deceased's house, and conversation arose about several gentlemen in the neighbourhood dying without sons, and somebody in the company said to the deceased, "it is a pity you don't marry and get children," and somebody replied, "Mr. Helyar has a nephew;" deceased answered, "Aye, a nephew," and then made use of some slighting expressions concerning his said nephew, but does not remember the expression; deceased and producent showed great affection to each other.

11. William Hicks.—Deposes to some conversation in September, 1749, but does not now remember the particulars.

12. Elizabeth Jeffreys.—Proves affection between deceased and producent, and visiting between them at London.

13. Neale Webber.—Deposes to affection between deceased and producent; producent was not present when deponent delivered key of deceased's trunk to Shury.

14. Margaret Rider.—Brotherly affection between deceased and producent; her character established.

15. William Bennet, Esq.—The same; they had a fondness for each other; believes it continued till his death; believes deceased was not godfather to William's child by choice, but from William's importunities.

16. Adam Pearse, Esq.—Brotherly love between deceased and producent; deponent expected deceased would make some great addition to producent's fortune from what deponent has heard him say; never heard deceased mention his nephew.

17. Countess of Clancarty.—Is well assured deceased had a great value for the producent, and he constantly showed it; her character unblemished; they corresponded and visited; at search in deceased's chambers, producent asked Shury for third key; he said he did not know where it was; deponent searched the drawer where the key was afterwards pretended to be found, and is sure it was not there at the beginning of the search.

18. George Dutton, Esq.—Present at search for will at chambers; producent asked Shury for his key; he said it used to hang on such a peg, and said he did not know where it was; it was not in the chambers when the search was first made, but Shury afterwards pretended to find it in a drawer which had been before carefully searched.

19. Neale Ashby.—Deceased and producent behaved kindly to each other; deposes concerning the third key the same as the other witnesses; says the drawer, when Shury found the third key, had been carefully searched before.

20. Jerningham Cheveley.—Deponent assisted in sealing up deceased's chambers; deposes the same as the other witnesses to the third key.

Exhibits read.

A, letter, dated 31st March, 1749, from deceased to Mrs. Page on business.

B, ditto, dated 5th September, 1749.

C, ditto, no date.

I, ditto, dated 7th April, shows deceased's intent to go to Newton.

K, letter dated 24th September, 1742, to producent from deceased, on business.

L, ditto, on business.

M, ditto, on business.

N, ditto, 12th November, 1748, on business.

O, ditto, 19th January, 1744-5; expressions of regard to producent; says "he was godfather to William's child, because he was so importunate he could not refuse without coming to an open rupture with him, and expresses himself slightly of William."

P, Ditto, dated 7th May, 1751, on business.

Q, ditto, dated 21st May, 1751, on business.

Inventory read.

*Dr. Pinfold's* argument for William Helyar.—No testamentary paper subsisting at deceased's death but the will. They seem to insist that this will was made by Carter, and William having made subsequent

wills, deceased's will ought not to enure to William's benefit; and, secondly, that the will of the 17th December, 1745, is a revocation of ours. Clear from the circumstances that our will was not conditional upon his nephew's will subsisting. It appears from three of their witnessses, that the deceased had no regard to the duplicate of William's will, whereas he took care of the will pleaded, and carried it with him. No proof that the last will subsisted after the deceased's death. The Court cannot receive parol evidence to the contents of a paper that does not exist. 5 Coke's Reports, *Cheyne's case*, no writing can be revoked or altered but by a writing. In equity, parol may be admitted in order to destroy fraud, Vern. 206, *Thynne v. Thynne*. Prove the papers subsisted at the deceased's death, and then the contents may be proved by parol. Parol proof is allowed to ascertain a thing described: Deleg., *Woodley v. Mills*, (a); cannot supply any words by parol. In this case, they are attempting to create a will by parol; any man's will may, by these means, be destroyed. Stat. Frauds, revocation is to be by some writing declaring the same, or burning, cancelling, &c.; but supposing parol proof may be received, the next question is, whether they have proved sufficiently the contents of the latter will? to revoke the latter must be contrary to the first will; Darley cannot certainly say Johanna was executrix in the last will; his evidence is not assisted by any one. Mr. William Helyar's declaration at the search will not prove there was a latter will in which Johanna was executrix. Our will was once the deceased's complete act. Deceased's behaviour to his nephew, and care of first will, show deceased intended the first should operate. Last will always in deceased's custody: no evidence that the will of 1745 was in the hair trunk, or that Shury was near the trunk before the search; witnesses directly contradict each other as to that fact, whether the key was in the trunk or not. A destruction of a will cannot be presumed; presumption is, that the deceased destroyed the last will—quo animo?—that the first will might subsist to keep the estate in the male line. The fact of disobligation is William's marriage; subsequent behaviour shows deceased was reconciled. Deceased was afraid of quarrelling with his sister, lest he should lose her moiety of Newton. Last letters from deceased to William show his regard to him. Declaration to Taylor in favour of William in March, 1751. William received kindly the last time he came to the deceased. Careful preservation of this paper, and of no other testamentary one, shows deceased intended to die testate with this paper.

*Dr. Smalbroke*, same side.—Will of 1742 was deceased's own act; it is not ascertained what the will in 1745 was; it might be a codicil. But one witness to prove last will; no proof that it was inconsistent with the former will: no declaration that he had left his real estate to his sister by will of 1745; great danger of perjury in allowing revocation on parol evidence of a latter will; parol evidence cannot support a total omission. A paper that is void as a will cannot operate as a revocation; it cannot be intended that a complete will shall be revoked by a will not appearing. 2 Vern. 741, *Onions v. Tyvers*, clause of revocation in a will that is void will not revoke a former will. Testator clearly and plainly showed his intention to re-establish his first will.

(a) *Woodley and Newth v. Mills*. Deleg. 9th July 1746. The judges present at the sentence were, Mr. Baron Clarke, Dr. Audley, Dr. Pinford, Jun., and Dr. Salisbury.

Deceased brought will of 1742 with him to Taunton, but he did not bring the duplicate of William's will.

*Dr. Clarke*, same side.—No doubt of the factum of the will of 1742; deceased never cancelled the old will. No satisfactory evidence of the contents of the later will; no reason can be assigned for his preserving the first will, but his uncertainty which should exist; improbable, under the circumstances of his family, that he should intend to give his estate to his sister, in preference to the heir of the family. A mere execution of a subsequent will does not destroy a former, because they may be consistent; a mere clause revocatory will not do. Uncertain whether, in the will of 1745, there was such a clause; if it was matter of form only, it cannot operate as a revocation, but can be only put in to support that will in which it was inserted: intention is the guide to presumed revocations; the last will was destroyed by deceased, and thereby he showed he had departed from the revocation. Statute of frauds will not allow a will in writing to be revoked but by an appearing will in writing. Revocation not to be presumed, *Swin. part 7, s. 14*. Latter will does not make void a former, when the latter is imperfect.

*Dr. Paul*, contra for Mrs. Johanna Helyar.—Shury knew what money was in the trunk before the search; therefore, he had looked into it. First will made for a purpose; notion of bartering wills at an end when William married; deceased never went to William's house, or ever saw his wife and children. They have insisted we have not made proof of the second will. Darley swears he made a will for deceased; proves execution, &c.; a will duly made may be revoked by a non-appearing will, *Swin. part 7, sect. 14, nu. 1*. It is sufficient that the executor might have existed, *ff. lib. 28. tit. 3. l. 1. Testamentum, lib. 16, cod. Inst. lib. 2. tit. 17. 2. Vin. eod. verb. superius rumpitur; L. Sanximus Cod. de Testamentis. Vinny, nu. 9, a will ipso jure rumpitur per posterius*: in those cases testator dies intestate. *Minsing eodem loco agrees with Vinnius*. Keeping a will does not give it force, *ff. lib. 29, l. 25, de testam. milit.* The practice is with us; *Prerog. Mich. 1746, Mannors alias Silvester against Roberts*; a second will which did not appear with a different executor was pleaded to revoke a former will, the court admitted the plea; afterwards by consent the next of kin had the administration. *Prerog. 1749, Shipway v. Shipway*, a plea of the same kind was admitted, but no proof made upon it. *Prerog. 1749, Jennings against Williams*, Thomas Quackly made his will; upon evidence that a second will had been made the court ordered the cause to be opened. Nothing can revive a will once destroyed but a republication; no evidence that deceased constantly carried the will of 1742 with him; parol evidence is not to be received to construe a will contrary to the words of it, but parol is good to prove the fact of making the will.

*Dr. Simpson*, same side.—The questions are, first, Whether there is legal proof of making the second will? If there is, secondly, Whether that does not revoke the first? Thirdly, Whether, then, the first must not be republished? Fourthly, Whether the last will was cancelled by the deceased? Statute of frauds only enacts, that a written will for personal estate shall not be revoked by a nuncupative will. We only prove a fact by parol that the deceased made a second will with a different executor: difference between parol to prove a fact and to prove contents and meaning of a will; ademption of a legacy must be proved by parol, when a thing bequeathed is given away by the testator; fact to



imply revocation may be proved by parol, as, for instance, the burning a will. Noy, f. 103, says, suppression of a will is punishable at law, &c. therefore must be proved by parol. 2 Peere Williams, 680, a release which was lost was set up in bar to a demand. Lord Chancellor said if execution could be proved, it would be a bar. Parol evidence of the fact of a will allowed, though the will did not appear. 1 Peere Williams, 793. *Hampden's case*, Hobart. 189, parol proof that a deed had been executed, and a violent suspicion that it had been suppressed, court made a decree against the party suspected. Full proof of the fact that a subsequent will was made; it was made after the deceased was godfather to William's child. Darley is supported by precedent, and subsequent declarations of the deceased, and by Williams's declarations. The fact of the execution of a later will, with a new executor, is an implied revocation. Revocations are favourable, because for the benefit of the heir at law or next of kin. *Roper's case* in the House of Lords, first will was revoked by one that was void on account of the estate being given to a Papist, Shower's Parliamentary Cases. *Nosworthy's case*, contents of the latter will totally unknown, and therefore, the first was established; but this case proves parol evidence is to be received. A latter will that is void revokes a former, Swinb. 7 part, sect. 14, nu. 1 and 2. Last will shall stand. Office of Executor, p. 25. Hardres, *Nosworthy's case*, a second will without a clause of revocation, revokes. *Sandes's case* mentioned in *Nosworthy's case*, first will revoked because a different executor was named in the last. Cod. lib. 6. de testam. L. 27. Sanximus Instit. lib. 2. tit. 17, nu. 2. Second will proves mutatio voluntatis; doubtful whether deceased destroyed this last will; evidence sufficient to oust the presumption that he destroyed it himself. Conversation with Newman about William's marriage settlement prior to the last will. Damarell and Newman both employed by William, and therefore under influence, and so not entire witnesses as to the trunk being locked; and both contradicted in several points. No doubt but Shury had access to the trunk after the deceased's death. If the court is of opinion that the last will was suppressed, we shall be entitled to costs. A will once destroyed cannot be revived but by express act of republication, or a necessary implication of revival. No declaration in favour of the first will after the last was made. 2 Vern. 736. *Batchelor and Searle*, Vinnius's Com. ad. lib. 2. tit. 17. Inst. 6. nu. 3. It lies on him that propounded the first will to prove that the deceased destroyed the last with intent that the first should revive. A will is destroyed by arrogation, afterwards the heir is emancipated, the first will is not revived ipso facto. Prerog. 20th May 1724, *Stacey and Dickens*, first will revived upon express declarations. Prerog. 1731, Oct. 25. *Vanier against Hue*, the same. Deleg. 23d May 1714, *Jennings and Whitehead*; Mr. Keck made a will in 1701, made another in 1713 with a different executor, which he afterwards burnt; on his death-bed he sent for a person to make his will. Sir Charles Hedges held the first was revoked by making the second will, and that a special act was necessary to revive the first: his sentence was affirmed by the Delegates. Prerog. 1718, *Burt v. Burt*, the same.

*Dr. Hay*, same side.—Question whether the will pleaded is the last testamentary act of the deceased; this depends on two questions; first, whether it has ever been revoked? if it has, whether it has ever been revived, and when? After 12th February 1742, deceased made another

will on 17th December 1745. Objection taken that we cannot prove the subsequent will by parol evidence. General apprehension on the deceased's death that something wrong might be done; parol evidence may be received in this case. By statute of frauds, you may prove fraud by parol; we insist parol evidence may be given of a will revocatory of a former; the view of the statute was to prevent wills in writing being revoked by words only. Destruction of one duplicate is the destruction of both, but such destruction must be proved by parol. It would be absurd to say a witness may depose to a will that does not appear, if he only asserts it existed after the testator's death, and yet shall not be allowed to depose to a fact of making such will, because it was not in being at the testator's death. Statute of frauds does not relate to this case, for the rules of evidence in that statute relate only to wills of real estates. 2 Salk. 592. 3 Mod. 203. 2 Shower, 537. Hardres, 374. 17 Car. 2, Pasch. *Hitchins and Basset*, Jury found a second will, but contents wholly unknown, and therefore, the court would not hold it to be a revocation of the former; for it might be a confirmation of it; this case shows clearly that a second independent will not appearing will revoke a former: judgment affirmed by the House of Lords. Prerog. 1749, *Jenkins against Williams*, Quackley made his will in February 1742; his sister opposed it; one of the witnesses deposed that long after the testator made a new will, in which he (the witness) was executor, but it could not be found; *Dr. Bettesworth* thereupon said, "How can I pronounce for this as the last will, when it appears upon oath that there was a later will," and he ex officio rescinded the conclusion of the cause, and allowed the sister to plead the fact of this last will as a revocation, but upon the evidence thereon, it appeared the witness was mistaken, for the paper he executed was a letter of attorney. In this case the second will was made soon after the birth of William's son, and soon after his sister's will in favour of deceased. Will of 1742 gone on 17th December 1745; what did the deceased do afterwards to revive it? A will destroyed by act of the testator cannot, as to lands, be revived without express republication, 1 Vern. 329. *Hall and Dunck*, slight evidence received to revive a will destroyed by implication, but it is otherwise when destroyed by the act of the testator: it is not always to be presumed that a will is cancelled by the testator. A month before the deceased left Newton, he said, as Hole deposes, "that his nephew was a pretty fellow, he will not settle accounts, Newman will be the best man." If the deceased did cancel his last will, it will not revive the first, but he is dead intestate; only two declarations, one to Newman in February 1749, at the temple, which relates to the education of William's children; that very conversation shows Newman knew the will he made for the deceased in 1742 was revoked by his asking deceased to take care of William's children. Taylor is the second witness to a declaration in March 1751; at South Taunton, Taylor said to deceased, "I suppose you purchase this estate of Trist for your nephew;" deceased answered, "Probably they may go together." Neither of these declarations can operate to revive a will; obiter declarations will not revive; they have insisted on the safe custody of this paper; there is great presumption of fraud, and of suppressing the last will; this will wrapped up with papers to which the sister had right of access; Shury had access to the trunk, therefore the presumption of the deceased's destroying the last will, is gone. We show Shury did go to the trunk

from the key being in it, and from his knowing what money was in it, but it is not material whether his access was before or after the deceased's death; these facts take away the presumption that the deceased destroyed the will; Shury was last in the study at Newton: brought his things away with him, contrary to his custom; left the windows there open through hurry. Custody alone will not revive a destroyed will.

*Dr. Bellesworth*, the same side.—Constant affection to sister; no declaration in favour of the nephew, except what Newman deposes to when the will of 1742 was made. Newman contradicted as to writings concerning the Helyar estate being delivered to him in 1743. Deceased's father died in September 1742. First will made sub spe remunerationis, which according to Swinburn will destroy it; there is an implied condition in the deceased's will, that he should, in return, have William's estate, which became impossible by William's marriage and the birth of children. In June 1745, sister made her will in favour of the deceased; deceased did not congratulate his nephew on the birth of his son, which happened in October 1745, but made the second will on the 19th December 1745. New will implies entire mutatio voluntatis; sufficient proof there was a new executor named in second will. *Prerog. Manners*, formerly *Silvester* against *Roberts*. *Prerog.* last term, *Davies* against *Davies* and *Evans*. *Roll's Abridgment*, 614, *French* against *Montague*. A last will, that cannot be carried into execution, shall revoke a former will. Deceased did not destroy the last will; there is no proof that he did; no motive for him to destroy it; in order to revive, there must be express proof of intention to revive. There are suspicions from whence fraud is to be collected, Newman knew there was another will, Shury and William both knew it, the family suspected some fraud. The key being in the hair trunk is a demonstration that Shury had been at it; *Damarell* and *Newman* say it was brought, by whom? For Shury, who had the key, was present; very improbable the deceased should put this will amongst the papers his sister was to inspect; Shury left the study at Newton in a hurry, and therefore left the windows open; Shury took the key of the chambers in the Temple.

*Dr. Pinfold*, in reply.—Parol evidence admissible in cases of fraud. They should show a fraud, but it is far otherwise; nobody saw the last will after it was executed; presumption that testator destroyed a will himself may be ousted by contrary proof, but not by suspicions. *Mrs. Helyar* could have no access to this trunk without deceased's knowledge, for he kept the key. Parol proof is not sufficient; the statute relates to subsisting wills; the case of *Hitchens* and *Bussell* was before the statute. Latter wills revoke former when they both subsist. No determinations in the cases of *Manners* and *Roberts*, *Shipway* and *Shipway*, and *Jenkins* and *Williams*. *Deleg.* 1714, *Whitehead* and *Jennings*, the judgment was founded on deceased's sending for a person to make a new will on his death-bed. *Prerog.* 1718, *Burt* and *Burt*, in 1687 John Burt made his will, and his wife executrix, in 1713 he made another, in which one Read and she were executors, which he destroyed by cancellation, and she burnt it after deceased's death. She prayed probate of first will, the brother pleaded the last will as a revocation; the first will was found among old papers of no value, the first will was not propounded. They have in this case presumed the contents of the second will. Nothing certain from *Darley's* evidence; the law has not prescribed any certain

act to revive; no circumstances to show the deceased intended to die intestate.

*Dr. Smallbrooke*, same side.—The will of 1745 could not revoke the former, because it was not inconsistent with it. Supposing there was another executor, it would not follow that the wills were inconsistent. Statute of frauds does not relate to revivals. Declarations are sufficient to revive.

*Dr. Clarke*, same side.—The deceased cancelled the last will to revive the first, as appears from preserving the first. Hole and Dridge on their second examination, and not before, say the key was in the trunk.

#### JUDGMENT.

SIR GEORGE LEE.

I took time to consider this case, and on the 9th January, 1754, gave sentence against the will propounded.

I was of opinion that the statute of frauds did not relate to parol evidence of the facts of a subsequent will with different executor, but only prohibited the revoking of a written will for personal estate by parol. That the question here was only whether parol evidence shall not be allowed to prove a matter of fact. That there was no more danger of perjury in receiving parol evidence in this than in all other cases. That the cases cited clearly proved that parol evidence ought to be received.

In the case of *Hitchens* and *Bassett*, 2 Salk. 592, though Sir Henry Killigrew made both wills long before the statute of frauds which was enacted in 1677, yet the cause was tried long after, viz. in 1688, as appears from Hardres, Salkeld, and other reports. Now if the statute had prohibited receiving parol evidence to prove a latter will which did not then appear, it is not to be imagined but that the counsel for the first will would have insisted on it as an absolute bar, but no hint of such objection was given in any of the reports.

Though there were no final determinations as to this point to the cases of *Manners* and *Rogers* in 1747, of *Shipway* and *Shipway* in 1750, or of *Jennings* and *Williams* in the same year, yet the admission of the allegations pleading subsequent wills as revocations of former, though the latter did not appear, showed that Dr. Bettesworth was of opinion that parol evidence was to be received, and also, that the latter non-appearing wills, if they were independent ones, would revoke the former, otherwise it had been to no purpose to admit the pleas.

That the cases of *Stacey* and *Dickins*, 1 Phill. 415, [1 Eng. Eccl. Rep. 127.] in 1724, of *Vanier* and *Hue* in 1731, of *Burt* and *Burt* in the Prerog. in 1718, and particularly the case of *Whitehead* and *Jennings* in the Deleg. in 1714, all fully proved parol evidence to prove subsequent non-appearing wills was to be received; and lastly, the case of *Sellars* and *Garnet*, 1 Phill. 430, [1 Eng. Eccl. Rep. 133.] in the Prerog. in October, 1746, was full to this point, for there an executed will was held to be revoked by a will wrote while the testator was alive, but he died before it was brought to him; and the contents were proved by witnesses who heard him give the instructions agreeable to what was wrote down. It was insisted that this parol evidence could not be received; that it was to revoke a written will by parol only, contrary to the statute; but both Dr. Bettesworth in the Prerogative and the Delegates who affirmed his sentence in 1751 were of opinion that it was a will in writing; that the parol proof of the instructions ought to be received, and that it was not a case within the statute of frauds.

Secondly, I was of opinion that the evidence in this case to prove the factum of a latter will, and that a different executor was named therein, was sufficient as to the fact that the deceased did make a will in 1745. It was fully proved by two subscribing witnesses, who swore that the third witness was since dead; and as to the contents, though they were proved only by Darley, who swore that to the best of his remembrance and belief, Mrs. Johanna Helyar was both executrix and residuary legatee in the will of 1745; yet he was strongly supported by circumstances; viz. from the deceased's displeasure to his nephew, from the satisfaction he expressed at his sister's making her will in his favour, from his declaration that he would make his, and his making one soon after, and from his having at that time lost all hopes of succeeding to his nephew's estate. But without these circumstances, the evidence of Darley alone would be sufficient; for so it was held in the case of *Whitehead and Jennings*, 1 Phill. p. 412. 426. 435. 439, [1 Eng. Eccl. Rep. 126. 132. 136, 137,] both by Sir Charles Hedges and the Delegates; for in that case Robert Taylor, the writer of the last will, deposed that Mr. Keck the testator, executed that will in the presence of himself and James Smith, and Edward Fewtrell; and as to the contents, he deposes that to the best of his remembrance and belief, the deceased had, by his said will, made Whitehead, his said wife's youngest son his executor; and to an interrogatory said he could now remember but one legacy in said will, viz. 100*l.* to Mr. John Tolson. Smith swore he did not know whether the paper he saw the deceased execute was a will or any other writing, and Fewtrell swore he believed it was a will he saw the deceased execute, but knew not the contents and there was no other witness to that point. So that the evidence upon this head in the present case is stronger than the evidence was in that case.

Thirdly, I was of opinion that the executing of a second will of a different purport was by law a revocation of the first, though the second does not now appear.

All the authorities that had been cited from the text law, and from the commentators, showed it; all the books said the first will is revoked by the completion of the second. The revocation does not depend on the keeping and preserving of the last will; the cases cited show the same. In the case of *Burt and Burt*, 1 Phill. p. 412. 429, [1 Eng. Eccl. Rep. 126. 132,] the deceased was declared to have died intestate, because he had made a subsequent will which had revoked the first, though it was afterwards cancelled, and did not appear.

So in the case of *Whitehead and Jennings*, though the deceased on his death-bed declared his disapprobation of his first will, yet these declarations could not have revoked it since the statute of frauds; the Court must have pronounced for the first will, if they had not decreed it to have been revoked by making the second will, which it was found the testator did afterwards himself burn.

Fourthly, I was of opinion that the deceased must have been presumed to have destroyed the latter will himself, because it had never been, so far as appeared, out of his custody (*a*) from the time it was executed. There was no proof that Shury ever saw it—nothing to affect him but mere surmises grounded on slight circumstances; for as to the key being

(*a*) *Richards v. Mumford*, 2 Phill. 23. [1 Eng. Eccl. Rep. 170.] *Freeman v. Gibbons*, Prerog. 1793. 2 Hagg. 325. 346. [4 Eng. Eccl. Rep. 141.] *Colvin v. Fraser*, 2 Hagg. 266. [4 Eng. Eccl. Rep. 113.]

in the hair trunk, the evidence was as strong on one side as the other. No evidence to affect Shury's character; I could not then presume him guilty of suppressing a will; and if I could suppose him capable of doing the act, I must go further, and suppose he was bribed to do it by Mr. Helyar, who alone could receive advantage thereon; but there was not the least colour from the evidence to suppose him capable of doing such an action.

Fifthly, and which was the main question, I was of opinion that the deceased had not done any act sufficient to revive the will of 1742; his having destroyed the last, and preserved the first will, were not acts sufficient for that purpose. There must be to revive, a republication or some express declaration of the testator that he would have the first operate as his will; the authority from Vinnius, Inst. lib. 2, tit. 17, s. 6, n. 3, was full to that purpose, and his opinion was founded on the Text Law, ff. de bon. poss. sec. tab. lib. 37, tit. 11, l. 11, n. 2. In the cases of *Vanier* and *Hue*, and of *Stacey* and *Dickins*, the testator's intentions that the first will should operate were fully proved. And in the case of *Burt* and *Burt*, where no such intention was proved, the deceased was pronounced to die intestate.

In the case of *Lewis and Bulkeley* (a), Deleg., 1732, Mary Williams made her will while sole, afterwards married Dennis Hampton, whom she survived, and at his death left the said will uncanceled, and very near her death declared she considered it as her will; but notwithstanding, a very full commission of Delegates (there being five Judges and eight Civilians) pronounced her to have died intestate, because, as the will was destroyed by her marriage, a republication was necessary to revive it.

In the case of *Whitehead and Jennings*, the testator did himself destroy the last will, and he kept the first amongst papers of the greatest consequence; if he had died without declaring any thing about the first, (and he did not declare his dislike of it till within five or six hours of his death) and the Court had, from the circumstances of the safe custody of the first, and his own destroying the last, pronounced for the first, it is clear from the evidence that a will would have been established which was not agreeable to the testator's mind.

The same probably would have been the case here, for the dislike the deceased showed to his nephew made it very improbable he should intend to revive the will of 1742.

When a testator has done a deliberate act to destroy a will, it would be very dangerous to construe it to be revived on surmises and conjectures only.

Upon the whole, therefore, I was of opinion to pronounce against the

(a) Vide sup. p. 361. The following observations are to be found in this case in Burn's Ecclesiastical Law: "And although the will be made before marriage, and the wife survive the husband, yet it seemeth that the will shall not revive upon the husband's death. As in the case of Mrs. Lewis some years ago before the Delegates: Mrs. Lewis, a widow, made a will, soon after which she married again: in some time her second husband died, and she again became a widow, without any children by either husband. The will which she made in her first widowhood remained, and being found after her death, the question was whether it was a good will or not. The counsel for the will cited many authorities from the civil law, and showed that, among the Romans, if a man made his will, and was afterwards taken captive, such will revived and became again in force by the testator's repossessing his liberty. But it was observed, on the other hand, that marriage is a voluntary act, captivity the effect of compulsion,"—4 Burn. E. L. 51.

validity of the will of 12th February, 1742, and gave sentence accordingly, but without costs.

N. B. Mr. William Helyar has appealed to the Delegates, and prayed a commission (a) to Lords Spiritual and Temporal; but on hearing counsel, the Lord Chancellor granted it only to Judges and Civilians, (b), because the questions in the cause turned upon points of law. The cause was afterwards argued (c), and Mr. Helyar renounced his appeal, and consented that the cause should be remitted back to the Prerogative Court; and upon the remission being brought in, I decreed administration to the sister and only next of kin, on the 14th January, 1757.

(a) The commission was addressed to Mr. Justice Wright, Mr. Justice Clive, Mr. Baron Legge, Sir Robert Salusbury, Drs. Walker, Jenner, Collier, and Harris.

(b) See the reasons assigned for this limitation by Lord Chancellor Hardwicke, 3 Atkyns, 798.

(c) This cause was compromised in the Court of Delegates, and was not, I apprehend, argued before that Court on the part of Mr. William Helyar; it was set down for argument on 13th January 1757, and the entry in the Delegates' Book is as follows:

\* "Helyar against Helyar and others, for information and sentence at the petition of the proctors on all sides:

"Farren exhibited a special proxy under the hand and seal of William Helyar, Esq. the party appellant in this cause, and by virtue thereof renounced the appeal heretofore interposed in this cause, on the part and behalf of the said William Helyar, and consented that the cause should be remitted to the judge from whom the same is appealed. The Judges having heard an advocate on behalf of Johanna Helyar, spinster, the party appellee in this cause, did, by their interlocutory decree, having the force and effect of a definitive sentence in writing, at the petition of Major, decree this cause, with all its incidents and emergents and things whatsoever, to be remitted to the Judge from whom the same is appealed, in the presence of Stevens and Bellas, not opposing the same."

The case of Helyar was pressed upon the Court of K. B. by Mr. Dunning as a high authority in support of an intestacy, when he argued *Glazier's case*, and he also seems to have been under the impression that the case had been decided after argument by the Court of Delegates.—See 4 Barr. p. 2513. Lord Mansfield and Mr. Justice Yates both advert to Helyar's case in their judgment in *Goodright v. Glazier*.

### Dr. BOUCHIER against HORNGOLD and Others.—p. 515.

An interest established in a pedigree cause. Executors of the asserted next of kin condemned in costs.

### MILLINGTON against SORSBY formerly calling herself TURBUTT.—p. 525.

A release from a party in distribution to the administratrix of an intestate, held to be good till it should be set aside in a court of equity; and a bar also to a demand for an inventory and account; but not to be a bar to calling in the administration, for the purpose of putting the administratrix on proof of her marriage.

DR. Hay, for Sorsby.—Benjamin Turbutt died 1st November 1751; left Elizabeth, his wife, now Sorsby, and Margaret Millington, his daughter. 15th November 1751, widow took administration, and agreed with Millington and her husband to make immediate distribution; made an inventory and account, and on 5th April 1753 Margaret and her husband

gave her a release in full; in September 1751 the daughter cited her to show cause why the administration should not be revoked, and granted to the daughter, upon suggestion that Elizabeth was not deceased's wife, and to bring in an inventory. We offer the release in bar to any suit.

*Dr. Pinfold*, for Millington.—William Millington, Margaret's husband, at first refused to sign the release, but at last did sign it, under threats of being arrested. The share Millington has received is 210*l.* 16*s.* 6*d.* but much more was due to her.

Affidavit for Sorsby.

William Watts proves distribution, and that the release was drawn by consent of parties and was voluntarily executed in presence of Millington's attorney.

Affidavit for Millington.

William Millington swears he did not know of the release, till it was tendered to him to sign. Swears he was indebted to Sorsby's husband, who threatened to arrest him, which induced him to sign the release.

James Thompson, to the same purpose.—Says he persuaded Millington to sign it, for fear of being ruined by an arrest.

*Dr. Hay*.—Prerog. Sept. 1746, *Williams* and *Roberts*, a general release held to be a bar to a suit, and the Court would not try the validity of it.

JUDGMENT.

Sir GEORGE LEE.

I was of opinion I could not inquire how the release was obtained. I must take it to be a good one till it was set aside by a court of equity, and consequently, that it was a bar to calling for an inventory and account, but with respect to the validity of the administration it was not a bar; the release was signed upon the supposition that Sorsby was lawful administratrix, but if she was not the widow she had no title to the administration, and therefore, I was of opinion, she must bring in the administration, and plead her marriage, in order to show cause why the administration should not be revoked; and I decreed accordingly.

The proctor for Sorsby prayed that Margaret Millington might be ordered to bring the money she had received for her share of the distribution into Court; but I was of opinion it was properly her own money, and that she ought not to bring it into Court, unless her interest as daughter was denied.

### TAYLOR against TAYLOR.—p. 527.

Administration to the estate of an intestate contested by two persons, who each claimed to be his widow. Administration pendente lite granted to the nominee of the one who was living with him at the time of his death, the nominee to lodge the money as received in the bank..

THOMAS TAYLOR died intestate. Ann Addis claims to have been married to him 30th June 1738. Mary Grant claims to have been married to him on 6th September 1747. They denied each other's interest, and they have respectively pleaded their marriages, which were both at the Fleet. The deceased kept a public-house. Both sides agreed the estate was perishable, and that it was necessary to have an administrator pendente lite. Ann Addis named Richard Lawler; Mary Grant named Rich-



ard Havergill ; both offered to give security in 2000*l*. and the two persons named for administrators, and their respective securities, were reported sufficient by the officer of the court, and there was no objection to any of them, except that the securities proposed on the part of Mary Grant were said to be creditors of deceased's estate, but there was no evidence of that fact. Ann Addis offered that the effects, as soon as they were collected, should be lodged in the bank in the names of the administrator and of the register of the court. Mary Grant thereupon made the same offer. Grant lived with deceased at his death, and has given in an inventory of his estate. Ann Addis could only give in a declaration, she having none of the effects in her hands, and at the time Addis pleads that she married deceased, it appeared from an affidavit of a person unconcerned in the cause, that he lived with another woman as his wife.

#### Affidavits for Grant.

Mary Grant.—Deponent knew the deceased, and knows Mary Grant, alias Taylor ; has been informed, and believes, deceased in 1736 married Isabella Noble, who died in August 1747 ; sets forth the places they lived at ; they had two children ; one born in 1730, the other in 1740 ; exhibits and proves certificates of their baptisms as the lawful children of deceased ; says Richard Havergill is an housekeeper ; gives him a good character.

Henry Crockford.—Proves Mary Grant publicly lived with the deceased as his wife, at his death.

Affidavit to prove the estate is perishable.

#### JUDGMENT.

SIR GEORGE LEE.

No affidavits were exhibited on the part of Addis. Upon these affidavits, and particularly in consideration that Mary Grant lived with deceased as his wife at his death, and by that means became properly possessed of the effects. I decreed administration pendente lite to Richard Havergill, her nominee, undergoing a monition to lodge the money in the bank pursuant to the offer in acts of court ; and he being in court, I swore him administrator, and admonished him accordingly.

### SHAND against GARDINER.—p. 529.

An allegation admitted in an interest suit.

Dr. Hay, for Francis Shand.—John Shand died intestate in 1747, left Alice Shand, his widow, who took administration ; she is since dead, and left effects unadministered. She made her will, and appointed Joseph Gardiner her executor and residuary legatee. He entered a caveat. Francis Shand warned it, and prayed administration de bonis non as cousin-german and next of kin to John Shand. Gardiner denied his interest, and we now offer an allegation pleading her relationship. The allegation deduced a pedigree from the common ancestor, but was not supported by any exhibits, or times or places of the several marriages, but only pleaded cohabitation, owning, and general reputation of the respective persons as husbands and wives, and of their children as legitimate.

## JUDGMENT.

SIR GEORGE LEE.

I admitted the allegation, especially as it was a pedigree of persons in low rank, who could not be supposed to have any writings, &c. to exhibit.

## COX against THOMPSON.—p. 529.

The revocation of a will established.

DR. Hay, for Richard Cox.—Elizabeth Street, widow, deceased, made her will on 27th January 1752, and appointed Richard Cox executor, and gave him most of her effects. She died 2d May 1752. Caveat entered by Smith alias Thompson, deceased's father. Cox warned it. *Bellas* appeared for Thompson. Cox denied him to be father to deceased, but propounded the will, and allowed him to be a contradictor. *Bellas* propounded Thompson's son's interest as father. 1 Sess. Hil. 1753, *Bellas* gave an allegation, pleading a revocation of all former wills. 3 Sess. Hil. 1753, Cox admitted a pauper. 6th March 1753, Thompson's interest pronounced for, but without costs, because Thompson had gone by different names, and there was no evidence to affect Cox with the knowledge of his being deceased's father. The questions now are, first, whether the will propounded is good; secondly, whether it is revoked. Instructions given by deceased. Will duly executed in presence of three witnesses; the will wrong dated; deceased thereupon ordered a new one to be made, which she duly executed. She lost that will, and then she made and executed the present will. The paper pleaded as a revocation is dated 29th April 1752; it was obtained by her father, by undue application to her on her death-bed.

*Dr. Bettesworth* contra, for Thompson.—Deceased died a widow without children. Admit factum of the will. Cox, who is a married man, and has four children, lived in adultery with deceased, and kept her constantly drunk. In her illness she was very desirous to see her father and mother; they were privately sent for, and came to town to her. She desired her father to go to Mr. Bygrave and get a revocation made. Four witnesses prove it. Pray the Court will pronounce for the revocation and for an intestacy.

## JUDGMENT.

SIR GEORGE LEE.

Witnesses for Cox fully proved the will, and on the other hand the witnesses for Thompson as fully proved the revocation. I therefore pronounced the deceased to be dead intestate; in this part of the case, it fully appeared that Cox knew Thompson was the deceased's father when he denied his interest, and therefore costs were prayed against him to the time he was admitted a pauper; but, though he had in all respects behaved very ill, yet as he was a pauper, and had nothing to pay, I did not condemn him in costs, because Thompson could have no real benefit therefrom, but could only gratify his resentment by laying Cox in gaol, perhaps for his life.

# ARCHES COURT OF CANTERBURY. 366.

BIRD, alias BELL, against BIRD.—p. 531.

An allegation in a suit touching the validity of a marriage, pleading irrelevant matter, rejected.

**Dr. Hay**, for Mrs. Elizabeth Bird.—Thomas Bird brought a suit of nullity of marriage against his wife, Elizabeth Bird, by reason of her former marriage, in the Commissary of St. Paul's Court. She appealed from admitting some articles of the libel. The appeal was pronounced for, and now we plead that, in April 1722, she married Robert Bell, who, in four or five months after deserted her, and she has never seen him since; that Bird solicited her and her parents to marry him, and assured her, upon inquiry, that Bell was dead; that with consent of her parents she married Bird in 1735 by license, and he swore her to be a widow, and lived with him as his wife till 1750, when he turned her out of doors, and she has had by him eight children.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion there was nothing in this allegation relevant, and therefore rejected it, the single question being, whether Bell was living at the time she married Bird, for if he was, her marriage to Bird was clearly void, and there was not a word in this allegation to show Bell was dead at that time; but as the case appeared to be very hard upon the woman, I would not conclude the cause, but gave her to the first day of next term to see whether she could discover that Bell was dead before she married Bird, and might (if she could make such discovery) have an opportunity to plead it.

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HILLYER against MILLIGAN.—p. 532.

The confession of the proctor of a party contesting suit sufficient proof of the exhibits of the adverse party.

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BARTON against ASHTON.(a) p. 533.

*Appeal from Lincoln.*

Articles against a parish clerk for immoral conduct and neglect of duty, admitted.

(a) Vide sup. p. 376.

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BAILY against BAILY.—p. 536.

*This cause began originally in the Arches, by Letters of Request from the Commissary of Lincoln.*

A divorce a mensa et thoro, by reason of adultery, pronounced for.

## RUMSEY against TIZARD.—p. 537.

A legatee brings a suit for his legacy. The executor admits the legacy, but pleads plene administravit, and exhibits an inventory and account. The legatee proceeds no further, and the executor is dismissed, but without costs.

TUNSTALL TIZARD made his will, and appointed his brother executor, who proved the will, 26th April 1750. Rumsey, a legatee therein, brought a suit for the legacy; the executor confessed the clause in the will giving the legacy, and the identity of the legatee, but gave a negative issue to the libel, and pleaded plene administravit, and exhibited an inventory and account, by which it appeared he had paid upwards of 111*l.* more than he had received; upon sight thereof, the legatee declared he would proceed no farther in the cause. *Dr. Jenner* moved that the executor might be dismissed with costs. Neither counsel or proctor appeared for the legatee.

## JUDGMENT.

SIR GEORGE LEE.

I was of opinion that the executor ought to be dismissed, but that he was not entitled to costs, for the legatee had not been guilty of any mala fides; sufficient assets were to be presumed till the contrary appeared, and in this case, as soon as the legatee found the executor had fully administered he proceeded no further; that I could not agree to what had been urged, viz. that the legatee should have called for an inventory and account in the Prerogative, and so have seen whether there were assets before he commenced his suit for the legacy, for that would be obliging a man to go through a suit in one court before he could apply for justice in another; which I thought a very extraordinary circuit; but as this was a point of practice, and I remembered no instance of this matter coming into question before, I desired the opinion of the advocates and proctors. All the advocates present, viz. *Drs. Paul, Simpson, Pinfold, Hay, Smalbroke*, and *Bettesworth*, unanimously, and most of the proctors, agreed with me that the executor was not entitled in this case to costs, and I accordingly dismissed him without costs.

## LEWIS against OWEN and WILLIAMS.—p. 538.

An appeal dismissed, because it had not been prosecuted within the time limited by law.

## HON. ROBERT HERBERT, Esq. v. HELLYER.—p. 539.

*Appeal from Winchester in a cause for Tithes.*

A proceeding by a lay impropiator, for the recovery of tithes under 2 Ed. 6, c. 13.

## PREROGATIVE COURT OF CANTERBURY.

## BURROUGHS against GRIFFITHS and HALL.—p. 544.

It is not competent to a creditor to dispute the validity of a will.

Where no person who has a right to oppose a will appears, the court is not bound *ex officio* to call upon the next of kin to appear.

*Dr. Pinfold*, for Burroughs.—James Strangeways, Esq. died 23rd December 1753; left a testamentary paper, dated 27th November 1753; directs his debts to be paid, and gives the residue of his estate to Samuel Burroughs, Esq. Master in Chancery, and appoints him executor; the paper was not wrote or executed by deceased. We are before the Court with affidavits to prove the instructions for writing said paper, and the deceased's intention in order to obtain a probate. Griffiths was the deceased's apothecary, and claims to be a creditor in the sum of 50*l*. Hall likewise claims to be a creditor, but has not made oath of his debt; deceased was related to Mr. Burroughs's wife; deceased declared to Peele his great affection to Burroughs, and sent him to know whether Burroughs would take the executorship. 27th November 1753, Burroughs sent his clerk, Mr. Romans, to tell deceased he would accept of being his executor; deceased then gave instructions to Romans, for drawing his will; he went home and drew it, and in the afternoon carried it to deceased, who read and approved it, but said it was almost dark, and he would sign it next day. 28th, Romans came again; deceased said when he was better he would come to Burroughs's chambers and execute it. 29th November, Griffiths went to deceased, asked the nurse if deceased had made a will? she said a paper was drawn; Griffiths bid her bring it to him; she did, and he took it away with him; the next day, Griffiths took deceased away from his lodgings in Chancery-Lane, and put him into lodgings at Dorman's, near Exeter Exchange; there deceased declared almost daily, that Burroughs should be his executor. Griffiths wrote another will, in which Dorman was executor, but deceased refused to sign it. Griffiths has no right by law to oppose the will as a creditor.

*Dr. Hay*, for Griffiths.—We as a creditor took out a citation against the next of kin to accept or refuse administration to deceased as dying intestate, or to show cause why administration should not be granted to Griffiths. A creditor may show defects in a will, in order to prove an intestacy to make way for an administration to be granted to him. Dorman was a relation to deceased.

*Affidavits for Burroughs.*

1. *Magdalen Hess*.—Deponent was intimate with deceased; Burroughs assisted him in his lawsuits; deceased had great affection for Mr. Burroughs, who was his near relation; believes deceased intended to give his effects to Burroughs.

2. *John Romans*.—3. *Thomas Wilkinson*.—John Romans says Burroughs sent deponent in November to tell deceased Burroughs consented to be his executor, deceased then desired deponent to draw his will for him, and gave him instructions that his debts should be paid, and Burroughs to be his executor if he would take the trouble, *and to have the residue*; deponent wrote said instructions, and then drew the will agree-

able to them and carried it in the afternoon to deceased, and took Wilkinson with him; deceased read it in presence of deponent and Wilkinson; deceased said he understood the contents, and desired deponent would call the next day about noon and he would then execute it; about two at noon next day, 28th November, deponent and Wilkinson went again to deceased, the deceased then said, he was sorry to give them so much trouble, but he would come when he was better to the chambers, meaning Mr. Burroughs's chambers, and execute it there; deponent never saw deceased afterwards; believes he approved the will, because he did not object to it; deceased afterwards was removed to another lodging. Wilkinson deposes the same as Romans, says deceased read over the paper, and said he understood the contents of it; deceased was very weak.

4. Ann Fear.—Deponent was nurse to deceased at Chancery-Lane; in November, deceased told Mr. Peele he was desirous to make his will, and Mr. Burroughs his executor. 27th November, Romans made a will for deceased, brought it and left it on the table with deceased; deponent put it in a drawer. 29th November, Griffiths asked deponent where the will was, and bid deponent fetch it to him; deponent did so without deceased's knowledge, and he put it in his pocket and carried it away; deponent afterwards asked him for it, but he would not give it her.

5. George Dorman, grocer.—30th November, deceased was brought to deponent's house; he never went out afterwards; deceased while at deponent's house expressed great regard for Burroughs, and said he wanted to go to him to settle his affairs, and said to that effect the day he died; verily believes deceased's intention was to make Burroughs his executor.

6. George Dorman.—7. John Romans.—George Dorman says Griffiths took lodgings at deponent's house for deceased; on the 30th November he was brought to deponent's house in a chair; says Griffiths told deponent deceased twice asked in his passage where they were carrying him; verily believes he was removed by Griffiths to prevent his executing said will; has often heard Griffiths say he was resolved to prevent deceased's executing said will, for he would not have Burroughs for his paymaster; Griffiths kept said will till deceased was dead. Griffiths told deponent he would arrest deceased for his debt, but deponent begged him not; if deceased lived a day longer Griffiths would have removed him from deponent's house; deceased frequently said he wanted to go to settle his affairs; believes deceased thought he should recover; he died suddenly. John Romans says he received the will from Dorman.

8. George Dorman.—9. Elizabeth Winterburn.—Winterburn says deceased was brought to Dorman's by Griffiths; deceased daily talked of going to Mr. Burroughs to settle his affairs; deponent one day locked him in his room to prevent his going, he not being fit to go abroad. Griffiths wrote a will for deceased, in which Dorman was executor; he and Dorman went to deceased with it, and Griffiths read it to deceased; deceased told deponent with great vehemence, that he should have gone mad if he had signed it, for Mr. Burroughs was to be his executor. Dorman says Griffiths wrote said will of his own accord without deceased's knowledge; deceased refused to sign it, and was very angry with Griffiths; deponent daily heard deceased declare his intention to make Burroughs his executor.

10. Joshua Peele, Gent.—Deponent was solicitor for deceased in his

law suits. 27th November last, viz. 1753, Griffiths told deponent deceased was very ill; deponent went to deceased and advised him to make his will; deceased intimated he should be glad if Mr. Burroughs would be his executor; deponent told deceased he would acquaint Burroughs therewith; he desired deponent would; deponent did that day tell Burroughs, (who expressed a regard for deceased,) and said he would send to him. 28th November, deponent met Griffiths, and told him he suspected he had been endeavouring to get deceased to make a will; deponent denies he said to Griffiths, "Surely Master Burroughs can't be endeavouring to get a will from deceased," or that Burroughs's name was mentioned; believes Griffiths prevailed on deceased to go to Dorman's.

*Affidavits for Griffiths.*

Thomas Griffiths.—Deceased was indebted to deponent 50*l*. 26th November last, Mrs. Hess told deponent deceased was gone from his lodgings, and asked deponent if he knew where he was; deponent inquired, and found he was at Church's in Chancery-lane. 28th November, deponent met Peele, who told deponent somebody had brought a will to deceased, and he wondered any body should do so; deponent said he knew nothing of it; Peele replied, "Surely it can't be Master Burroughs;" deponent asked the nurse about the will, and she gave it to deponent, and after he had read it he returned it to the nurse, who put it into the drawer; deponent went again that day to deceased, and deceased said he wanted to go to some other lodgings; deponent asked him if he would go to Mr. Dorman's, he said "Yes," and asked if Dorman would receive him, and keep him from signing; deponent bid nurse give him the will, and deponent took it away with him; deponent received a message from deceased to desire Dorman to come and fetch him, and soon after deponent received a message from deceased to come and accompany him to Dorman's. 30th November, deponent proposed to deceased to make his will; deceased said he would if deponent would be his executor; deponent excused himself, but advised him to make Dorman executor; deponent copied the will wherein Burroughs was made executor, only putting in Dorman's name instead of Burroughs's; deponent brought it to deceased, and he said he would consider of it; cannot swear to the words of that conversation.

*Act read.*

Cæsar Griffiths, proctor, alleges that deceased refused to execute the will in favour of Burroughs, and is dead intestate; has heard Pyle, Dorman, and Burroughs's wife are deceased's relations, but knows not in what degree; prays citation against them.

*Dr. Pinfold's argument for Burroughs.*—Griffiths as creditor cannot oppose the will, he can only pray a constat of the estate; the presumption that deceased had departed from the will arising from his declining to execute it on the 27th and 28th November, may be ousted by proof of his intention continuing; he declared he would come to Burroughs's chambers to execute it. 28th, Griffiths took the will away, and on the 30th November he removed deceased into his own custody, even then deceased always spoke of Burroughs as his executor, and of going to him to settle his affairs; therefore he continued in the same intention.

*Dr. Hay, contra, for Griffiths.*—If a will is invalid a creditor may show it to be so, that he may obtain administration; a creditor for that reason may show that a nuncupative will is not made with the formali-

ties required by the statute; in this case there is only one witness who deposes to the instructions, and giving them is the only act deceased did in support of the will; but his refusing to execute it when he had an opportunity both on the 27th and 28th November, and his never executing it afterwards, was clearly a departure from it and rendered it invalid, as was determined by the Delegates in the cause of *Williams and Wynne*, (vide supra, p. 397,) and lately in this court in the cause of *Lady Ann Jekyll* against *Jekyll*, as there is no act of the testator appearing upon the paper, the Court cannot grant probate of it without first citing the next of kin.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion a creditor had only a right to have a constat of the deceased's estate, to see whether there were assets sufficient to pay the debts, but could not controvert the validity of a will, for it was indifferent whether he should receive his debt from an executor or an administrator, and if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense and delay to executors, and therefore I heard *Dr. Hay's* objections to the will rather as an amicus curiæ than as counsel for Griffiths.

2ndly, I was of opinion, since nobody who had a right did appear to oppose the will, that the Court was not obliged ex officio to order a citation to issue to call the next of kin; if there was evidence enough to satisfy the Court that the paper before me was the will of the deceased, I was sufficiently founded to grant probate to the executor.

3rdly, I was of opinion the affidavits sufficiently proved this will; the law did not require more than one witness to prove instructions, and they were proved by more than one witness but in few cases; the deceased voluntarily gave the instructions, sent to Mr. Burroughs to know if he would be his executor; Mr. Burroughs did not see or influence him, he read the paper, knew the contents, and declared both on the 27th and 28th November, that he would execute it, though he declined doing it then; after that time it was not in his power, for both the will and the testator himself were in the custody of Griffiths, who endeavoured to get a will from him, which the deceased refused to execute, and during the whole time he was in custody to the very day of his death he constantly declared a permanency of the same intention in favour of Burroughs, which differenced this case extremely from the cases that had been cited, for in those cases there were no declarations to show a continuance of intention after the testators had declined executing them; and therefore I pronounced for the will, and decreed probate to Mr. Burroughs. I observed that only three relations to the deceased were mentioned in the act, two of whom had clearly knowledge of the will, to wit, Dorman, who had made several affidavits in the cause, and Mrs. Burroughs, wife to the executor, and yet they did not think proper to oppose the will: that creditors had not any title by law to administrations, that they were only granted to them by the practice of the Court when nobody else appeared to accept them; that Griffith's behaviour had been so bad, and his affidavit was contradicted in so many particulars by the other affidavits, that if the deceased *had died* intestate I would not have trusted him with the administration if any other person would have taken it. But with respect to costs, I gave only 1*l.* 6*s.* 8*d.*, the common costs of a motion, because under the circumstances of the case, the



Court could not have granted probate unless the will had been proved by affidavits, and therefore, Mr. Burroughs had not been put to any extraordinary expense by Griffiths's opposition.

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PYTT against FENDALL and JONES.—p. 553.

The renunciation of an executor, rejected.

*Dr. Simpson*, for Pytt.—Rowland Pytt died a widower, March 1746; devised a leasehold and freehold estate to Leonard Pytt, my client, by his will dated 12th Dec. 1746, and gave the residue of his estate real and personal to William Fendall and William Jones, in trust to raise money to pay his debts and legacies and mortgages, and to discharge incumbrances on the estate given to Leonard Pytt, and then in trust, to convey the remainder to his son Elijah Pytt, and made Fendall and Jones executors, he left duplicates of his will in their custody, they have not taken probate, but never renounced, and have acted as executors. Leonard Pytt, in 1749, filed a bill in Chancery to establish this will, and to have the estate devised to him, discharged from the incumbrances; the executors appeared and assented to the will being established; the matter was referred to a Master. Pytt is entitled to costs, but there must be a legal representative of deceased before costs can be decreed. In January 1753, Pytt cited Fendall and Jones to accept or refuse probate, or to show cause why administration might not be granted to a third person to substantiate proceedings in Chancery; that citation was returned, and they did not oppose such administration, but finding that would not answer our purpose, we afterwards took out a citation to show cause why they should not be compelled to take probate, on account of their having acted as executors. We shall shew they have intermeddled, for they assented to and ordered Elijah Pytt to take possession of the real and personal estate of deceased, and joined with him in releasing a debt due to deceased from one Fling; they have assented to a legacy; a leasehold estate for years was bequeathed to Pytt on which deceased had charged a mortgage for a term of years, they joined with Pytt in taking a release from the mortgagee, and assented to its being conveyed to Pytt; they have joined with Elijah Pytt the residuary legatee in conveying real estates, which by the will were made equitable assets. We have affidavits to verify these facts; they have none to contradict them. Jones has given a proxy of renunciation, in which he does not deny having acted.

*Dr. Hay*, contra, for Jones.—Fendall is dead; the question is, whether Jones is obliged to take probate; 8th January 1753, he was cited to accept or refuse probate, or to show cause why administration to substantiate proceedings in chancery should not be granted. Jones appeared, brought in the will, and declared he had no objection to such administration being granted; afterwards he was cited again to take probate; he did not appear; whereupon he was excommunicated; but it being done irregularly without a schedule, &c., the Court declared it void. A special proxy of renunciation is exhibited by Jones; the foundation of the motion is, that Jones has acted as executor; but we shall insist he has not. Fendall and Jones were made trustees by deceased's will to pay

debts, &c., and then to pay the residue to Elijah Pytt, deceased's son. Jones in a few days after deceased's death delivered his duplicate of deceased's will to Elijah Pytt, who took possession of the effects; that is an evidence Jones never intended to act as executor; he acted as a residuary legatee in trust, but not as executor.

*Affidavit ex parte Pytt.*

Leonard Pytt, 12th February, 1754.—Deceased died 13th March, 1746, made Jones and Fendall executors and residuary legatees in trust for his son, who by consent of the executors, as deponent verily believes, possessed himself of deceased's effects; 17th March 1746, Jones read deceased's will, and by consent of the executors, Elijah Pytt entered on deceased's estate. Executors acted as such in joining with the son in purchasing land of Fling, on which there was a mortgage to deceased to secure a debt of 50*l.* due from Fling to deceased, which the executors allowed him to retain as part of the purchase money, and gave Fling a discharge of the said 50*l.* as if it had been paid; they joined with the mortgagees to convey a term to deponent on the leasehold estate devised to deponent by the will; they have kept the will in their custody.

*Dr. Simpson's argument.*—We shall show what acts by law amount to acting as executors to oblige them to take probate. They may assent to a legacy and receive or discharge before probate, Roll's Abridgement, 417. Assenting to a legacy subjects an executor to a devastavit in case there are not sufficient assets; acquitting or releasing a debt is acting, 1 Moor, 14. 1 Anderson, 11. Entering on a term for years is acting; in this case the executors have assigned a term. Wentworth, Off. Ex. says, assigning a term is acting; when an executor has acted he cannot renounce, Godolph. Repert. Can. 141. 2 Jones, 72. 2 Mod. 146. 1 Vent. 303. 2 Levinz. 182. In that case though administration is granted, the ordinary may revoke it, and compel the executor to take probate, Off. Ex. f. 57. Suit against administrator; he pleaded in bar that there was an executor; held a good plea. These executors assented to the devise of the leasehold estate to Leonard Pytt, and joined in making the devise effectual. Without such joining by them, that estate would have been liable to the creditors; their assent as trustees would not discharge the estate from the creditors; they are devisees of the real estate for payment of debts, which is therefore equitable assets. Fling owed deceased 50*l.*; nobody but executors could give him a discharge for that debt; the law will presume they acted as executors.

*Dr. Pinfold, same side.*—In six years' time since the testator's death somebody must have acted; none but the executors could act, because they had not renounced. Elijah Pytt could not take possession of the effects but by assent of the executors. Jones delivered the will to him and consented to his acting. Fling's estate mortgaged to deceased for 50*l.*; Elijah Pytt bought that estate, and the executors released that debt. Moore's Rep. *Stokes and Porter's case*, an acquittance of a debt of 7*l.* was held to be an administering. Prerog. *Hudson and Short*, the executor intermeddled in some slight particulars; held he could not renounce, but must take probate; none of our facts are contradicted.

*Dr. Hay and Smalbroke, for Jones.*—We admit the law as cited; but insist Jones has acted only as a trustee, not as an executor, and therefore cannot be compelled to take probate; his consenting that the son as residuary legatee should act, was not an acting himself, but a declining to act as executor; it would be hard and unreasonable to compel him to

take on him the burden of the executorship against his will, by which he may be involved in law suits for his life.

JUDGMENT.

SIR GEORGE LEE.

I observed, it was admitted on both sides, that Jones had acted under the deceased's will, and as he was both trustee and executor, and had not renounced, the law would presume he had acted in his superior capacity, that of executor; but in this case the matter does not rest on presumption, for he had clearly acted as executor in discharging the debt due from Fling, which he could not do as a trustee, but must therein act as executor, and had thereby determined the option he originally had, of taking on him the executorship or not.

I therefore rejected his renunciation, and assigned him to take probate of deceased's will by the 4th of April 1754. (a)

(a) After looking through a great number of cases, I find none where the Court has refused to dismiss, except on the ground of the party having intermeddled with the effects. The reason for this is obvious, that where a party has intermeddled, he has taken upon himself the burthen, and acquired the responsibility of an executor: that was the principle of the decision in *Haywood v. Bridges*, Prerog. 1756.—(Sir John Nicholl's judgment in *Jackson and Wallington v. Whitehead*, 3 Phill. 579.) [1 Eng. Eccl. Rep. 478.]

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### COX against PECK.—p. 557.

In a case of intestacy the security proposed held to be sufficient.

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### HIBBEN against CALEMBERG and SHERMAN.—p. 558.

An application to examine witnesses de bene esse, rejected.

THE cause stood on the admission of Hibben's allegation, pleading her interest as sister to the deceased, General Frampton; her counsel pressed to have the allegation come on, but Dr. Jenner, on the other side, said he was not ready, and Dr. Bettesworth, who is counsel with him, is out of town. I therefore put off the debate of the allegation till the 4th of April. Dr. Pinfold for Hibben, then moved that they might examine witnesses de bene esse on the 6th article, which pleaded ownings of her as their daughter, by the father and mother of General Frampton, and identity of persons, upon the suggestion that two very material witnesses to prove that article were old and might probably die, and he read an affidavit, which said one of the witnesses was 78 and the other 79, but did not say either of them was ill and in danger of death.

*Per Curiam.*

I therefore did not think there was reason upon that affidavit to alter the common course, and rejected the motion to examine them de bene esse.

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### LLOYD against NEVILL and NEVILL.—p. 559.

A will propounded not sufficiently proved to be the act of the deceased.

*Dr. Pinfold*, for John and Elizabeth Nevill.—Augustine Church, deceased, made will dated 16th October 1749; left all his fortune to Elizabeth Nevill, at whose house he lodged, and had so done for a year, and made her and her husband executors. Will executed in the evening of 16th October, and he died in the night; proved in common form on 19th October 1749; in April 1752, Lloyd, the deceased's daughter, cited the executors to bring in the will, and prove it by witnesses, &c. The Nevills not related to deceased, but he had great affection for them; 16th October, deceased said he wanted to make his will, and sent Mrs. Nevill for Hodson, an attorney, but he was not at home; the next day deceased sent her again to Hodson, with directions to make a will, and give her and her husband all; Hodson never saw deceased; but delivered the will to Nevill or her husband. Mrs. Nevill read the will to deceased, and he read it himself, he executed it at nine at night in presence of three witnesses; the deceased's mark appears to it, but the witnesses did not see him make his mark; he approved it by saying, "Ay, ay;" the deceased was in his senses. Lloyd has pleaded imposition; Mary Parker is their main evidence, who swears fully to the facts pleaded; but she is proved to be of an infamous character; the Nevills, are persons of good character; no attempt is made to set up Parker's character. Edward Parker and Mary his wife, both came to Mr. Farrer's office with the Nevills when they took probate, and then said it was a good will, and affirmed the same to Mr. Watson; Parker afterwards quarrelled with Mrs. Nevill, and carried her before a justice of peace, on pretence that she had stolen a napkin; Edward Parker expressed great malice to the Nevills. Ann Lloyd disoblged the deceased by marrying a soldier without his consent.

*Dr. Hay*, for Lloyd.—Deceased died on 18th October 1749, about twelve at night; probate taken next day. William Nevill, nephew to deceased, produced to prove instructions; he says deceased, on 15th October, desired Mrs. Nevill to go to Hodson, to get him to make his will; Hodson not at home; next day deceased again desired Mrs. Nevill to go to Hodson, and direct him to make a will for deceased and give her all. Mr. Taddy, deceased's apothecary, was then present but has not been examined; all the witnesses say he was dying at the time it is pretended he executed it. Parker says he was induced to attest the will by Nevill's entreaties; I shall not read Mary Parker's deposition; I give no credit to the Parkers, but shall rely on their witnesses and two of our own. Ann Cleves fully proves deceased was not sensible when William Nevill swears the instructions were given, and when the will is said to have been executed. Hodson was an entire stranger to deceased; he received instructions only from Nevill; when Hodson brought the will to Nevill's house he desired to see deceased, but she would not let him.

*Witnesses for Nevill.*

1. William Nevill.—Deponent knew deceased a year before his death, during which time he lodged at Nevill's. 15th October 1749, deceased desired deponent's aunt, Mrs. Nevill, to go to Mr. Hodson, and desire him to come to him and make his will; she went, but Hodson was not at home; next day, in presence of deponent and Taddy, deceased bid her go again to Hodson and tell him to make a will, and give all to the Nevills on account of the trouble and charge they had been at for him; in the afternoon Elizabeth Nevill read the will pleaded to deceased, he approved it and said it was his will, and then deceased desired depo-

nent to help him up in his bed, and he then read the will himself, and said it was to his mind, and wished he could give them more; desired deponent to come in the evening to meet Taddy and see him execute it; deponent went, but Taddy did not come, and deponent was obliged to go away; deceased was of sound mind, &c.

1. Int. Deceased could write a good hand when in health.

2. Luther Gill.—Deponent in October, 1749, was apprentice to Edward Parker, and went with his mistress to deceased, who was a stranger to deponent, and when deponent came up Mrs. Parker said to deponent, "You must witness that will," which then lay in the room, but before deponent witnessed it she sent him for his fellow-apprentice George Smith; Edward Parker, deponent's master read the will twice to deceased, and asked him if it was his real will; deceased seemed satisfied, and tried to speak but could not; then Edward Parker said to deponent and Smith, you hear him answer as plain as he can, and bade them sign the will as witnesses; deponent did not see deceased set his mark or seal to the will; deceased delivered the will to Edward Parker; deceased seemed to be in his perfect senses, though he could not speak.

1. Int. Respondent never saw deceased write. 3. Int. Believes the mark was made before deponent came into the room. 5. Int. Deceased was dying when the will was attested; he rattled in his throat; Mrs. Nevill and Parker said to deponent. "Smith, you hear him say, Ay, ay."

3. George Smith, æt. 18.—Deponent knew deceased; on the 16th October deponent was sent for to deceased's lodgings; deponent went, and there heard Parker, to whom deponent is an apprentice, read the will pleaded three times to deceased; Parker asked him if he approved it; he said as well as he could, "Ay, ay;" deponent did not see him sign it: believes he was in his perfect senses.

3. Int. Cannot tell when the mark was made. 5. Int. Deceased appeared to be dying.

4. Edward Parker.—About nine at night, in October, 1749, deponent was at Nevill's, and there for the first time saw deceased; the mark was made on the will when deponent first came in; Nevill asked deponent to subscribe the will as a witness, which deponent and his apprentices did; deponent did not see deceased sign or seal the will or publish it, save that deponent read it to deceased, and asked him if it was his will, and he made no other answer than "Ay, ay," and that rather as rattling in his throat than speaking; deceased died within two hours after.

N. B.—He does not depose to sanity.

3. Int. The mark was made before deponent came to deceased.

4. Int. Does not believe he was sensible. 5. Int. Elizabeth Nevill prevailed on deponent to attest it.

Witnesses for Lloyd.

1. Stephen Hodson, gent.—Deponent never saw deceased; on the 16th October, 1749, Elizabeth Nevill, whom deponent knew, came to him, and desired him to make a will for deceased, and said deceased would give all to her, and make her and her husband executors; deponent drew a will and carried it to Nevill's house, and asked for deceased, and said he had brought the will; she replied, "You may leave it; and I will show it to Mr. Church;" deponent did not see it executed.

8. Int. The ministrants have a general good character, otherwise deponent would not have drawn a will from Mrs. Nevill's instructions.

9. Int. Edward Parker was very active for the Nevills, and insisted that the deceased had approved the will.

2. Ann Cleves.—Knew deceased a year before his death; he died in the night of the 19th October, 1749, at Nevill's house; deponent for five days next before deceased's death, at desire of Elizabeth Nevill assisted her at her house, and daily saw deceased; on the night but one before deceased died, deponent being in deceased's room with John, Elizabeth, and William Nevill, deceased was then speechless, and had a rattling in his throat and was insensible, and was so on the day before, and continued so to his death. Elizabeth Nevill said "I shall be ruined if I don't get the will signed, for he owes me a great deal of money;" Nevill fetched the will and carried it to deceased's bed, and put a pen in his hand and endeavoured to guide his hand to make a mark, but after trial, she said it would not do; next day after deceased's death, she told deponent she had got the will signed.

Witnesses for Nevill.

1. Peter Foster.—Gives good characters of John and Elizabeth Nevill.

2. William Lascelles.—Same; does not believe they would obtain a will unfairly.

3. Thomas Edsell.—The same.

4. Malachy Blake.—Same; Mary Parker has the character of a common prostitute; some time before this cause began Parker and his wife carried Mrs. Nevill before a justice for stealing a napkin; the justice dismissed her, and then Parker said to her, "I have not done with you yet."

5. Charles Butler.—Deponent well knew deceased; often heard him talk of having been in foreign countries; deceased was very intimate with the Nevills, and said he would leave all he had in the world to them, to make them amends for their care of him in his illness, and he never could do enough for them; never heard him mention his daughter; gives the Nevills good characters; Mary Parker is a person of bad character, on 3rd March, 1752, Parker sent a warrant against Nevill to the deponent, as constable, the deponent carried her before a justice, who dismissed her; Edward Parker then said, "If I was sure to swear my soul to hell I would ruin the bitch."

6. Lucretia Thornton.—Gives good characters of the Nevills, and bad of the Parkers. 3rd March 1752, the justice dismissed Nevill; Edward Parker then said, "As I can't have my revenge on Nevill now, I will try what I can do in something else, for I will swear Church's will was forged, and will swear my soul to hell to ruin Nevill and his wife, if I ruin myself." In May and June, 1752, heard him say, he had sworn enough to ruin the Nevills.

7. William Nevill.—Deceased expressed great friendship for the Nevills; several times before and after deceased kept his bed, he said he would leave all he had to Elizabeth Nevill, and wished he could leave her more, and said he had no children.

8. Thomas Warm.—Deponent is clerk to Mr. Farrer, and thereby came to know the Parkers; Edward Parker came with John and Elizabeth Nevill to prove deceased's will, and then said it was a very fair will, and that he was a witness to it.

9. William Watson.—Deponent well knew deceased; he lodged some time with deponent; deceased's daughter several times came to see de-

ceased, and he seemed displeased thereat, and afterwards he told deponent she had married a soldier against his consent, but after that he seemed very civil to her. Parker and his wife came with the Nevills to demand the goods of the deceased which were in deponent's hands; the deponent told them the deceased had a daughter, and he scrupled to deliver them; whereupon, Edward Parker said, as there was a will, her being daughter signified nothing.

*Dr. Pinfold.*—Whether deceased made the mark to the will or not, if he approved it, it is a good will for personal estate. William Nevill contradicts Cleves; it is certain Edward Parker at first said it was a good will.

*Dr. Hay, contra.*—Question whether deceased has done the act; whether he gave instructions for the will? The will propounded is not agreeable to the instructions, as sworn to by William Nevill, for he says deceased ordered Elizabeth Nevill to tell Hodson to give his fortune to John and Elizabeth Nevill. This will was procured to secure a debt due from deceased; if it had been a sailor's will it would have been void on that account.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion there was not a satisfactory evidence that the will propounded was the act of the deceased, and therefore pronounced against the validity of the will, and that so far as appeared to me, the deceased was dead intestate, but gave no costs.

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## ARCHES COURT OF CANTERBURY.

The HON. ROBERT HERBERT, Esq. against HELLYAR.

—p. 567.

In a suit for tithes, sentence carried into execution as to costs after an appeal had been interposed.

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## PREROGATIVE COURT OF CANTERBURY.

JENKINS, Attorney of MORRISON, against BAYLEY alias WILLIAMS.—p. 568.

A mariner's will proved at Boston, in New England, not established.

JOHN WILLIAMS, mariner, died a bachelor; left his mother, Bayley, formerly Williams, his only next of kin. She took administration to him, 11th May 1749; a will was proved by Morrison at Boston, in New England, and afterwards he cited Bayley, alias Williams, to bring in the administration, &c. She appeared, and opposed the will. The executors propounded it, and took out commissions for examining witnesses, which he never returned, nor examined any witnesses to establish the will.

*Per Curiam.*

I therefore pronounced against the will, and that deceased, as far as appeared to me, was dead intestate, and condemned the executor in 8*l.* costs.

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BRADDYLL, formerly JEHEN, against JEHEN.—p. 568.

Articles of an allegation which had been in substance pleaded before, rejected, but letters allowed to be pleaded in supply of proof.

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SMITH against PRYCE.—p. 569.

If a creditor swears to a certain sum due to him, he is entitled to an inventory of the estate of an intestate.

JOSEPH SMITH, attorney at law, as a creditor, cited Jane Pryce, executrix of her husband, David Pryce, to bring in an inventory and account, and made affidavit of his debt, in which he swore that deceased was really and truly indebted to him at the time of his death, in the sum of 12*l.* and upwards for business done, and money lent him, of which he had received no part. The widow objected to the affidavit as not full and sufficient, and made affidavit that, since deceased's death, she had paid Smith 8*l.* 16*s.* 5*d.* as a debt due from deceased, and she verily believed deceased owed him nothing more, and that deceased was a bankrupt, and discharged in June 1741; her counsel, therefore, insisted that Smith should swear precisely to the exact sum due to him, and not say 12*l.* and upwards, and should specify what the business he had done for deceased, and when.

*Per Curiam.*

But I was of opinion the affidavit was full enough and sufficient; I could not try the validity of a debt, and if a creditor swore to a certain sum due to him, it was enough to entitle him to an inventory, which every executor of course by law is bound to give in. I therefore decreed Pryce to exhibit an inventory and account; but under the circumstances of this case, I did not give costs.

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LADY MAYO against BROWN.—p. 570.

Objections to answers sustained.

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TAYLOR against TAYLOR.—p. 571.

Where marriage is pleaded in bar to the interest of an asserted widow, strict proof of the marriage is required.

THOMAS TAYLOR, died intestate. Mary Grant alleged herself to be his widow, and prayed administration. Ann Addis alleged and pray-



ed the same. *Hughes*, for Mary Grant, pleaded a marriage with deceased on 6th September, 1747. *Alexander*, for Ann Addis, pleaded marriage with deceased on 30th June, 1738. Then Grant gave in an allegation, in which she pleaded, that on 30th June, 1738, the deceased was the husband of Isabella Noble, whom he married on 10th April, 1736, had two lawful children by her, and she died and was buried 21st August, 1747; they pleaded only the time of this marriage to Noble and cohabitation.

*Dr. Paul*, counsel for Ann Addis, insisted they ought to specify where and by whom they were married.

*Per Curiam.*

I was of opinion they ought to do so, notwithstanding both the parties were dead; because cohabitation was a proof of marriage only in favour of children or next of kin, who claimed under a marriage of their ancestor; but here the marriage between the deceased and Noble was pleaded as a bar to the interest of Addis, and to invalidate her marriage, and therefore a strict proof of that marriage with Noble was necessary; presumptions could not by law be made in favour of it.

## ARCHES COURT OF CANTERBURY.

64 11

BIRD, alias BELL, against BIRD.—p. 572.

In a matrimonial suit where alimony is due, it is to be paid before the hearing of the cause. 366.

*Dr. Hay*, for Bell.—This is a cause of nullity of marriage by reason of a former, brought by Bird against Bell, his wife, after living with her fifteen years, and having eight children by her. The Court allowed her 20*l.* a year for alimony, payable quarterly, pending the suit; a year's alimony was due the 8th of April last; the cause will be heard next term, by which time another quarter will be due. We pray that the Court will decree her a year and quarter's alimony, to be paid before the cause is heard, and will tax the bill of costs.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion, I could only order such alimony to be paid as was now due, and that it was not usual to tax the full bill of costs, but only to allow money on account for hearing the cause, and therefore ordered that 20*l.* now due to her for alimony, and 30*l.* for hearing the cause, should be paid to her before the cause should be heard.

ELLIOT, formerly HOLWELL, against HOLWELL.—p. 574.

*Appeal from Exeter.*

In a suit for legacy, held that there were sufficient assets left by the testator to pay his debts and legacies.

*Dr. Pinfold*, for William Holwell.—John Holwell, the deceased, made

his will 10th August, 1731; appointed his brother, Andrew Holwell, executor and residuary legatee, who took probate in 1743; he left a legacy in these words: "I give to my two cousins, William and Mary Holwell son and daughter of my brother, William Holwell, deceased, 20*l.* a-piece, to be paid respectively at their respective ages of twenty-one years." Andrew, the executor, who took probate, is since dead, but made his will, and has appointed his daughter, Ann Elliott, his executrix, who has taken probate. William Holwell has brought suit at Exeter against her for his legacy of 20*l.*, and in the libel pleaded assets, which she has denied, and has given in a plea that she had not assets, which Holwell has denied, and she has not examined any witnesses. We have examined three witnesses to prove assets. Andrew, by his will, gives his lands to his daughters, upon condition that they should pay the legacies left in John's will to William and Mary Holwell. Sentence at Exeter, for the legacy to William, from which Elliot has appealed; single question, whether the testator, John Holwell, left assets sufficient to pay his debts and legacies.

*Dr. Paul, for Elliot.*—All the legacies in deceased's will amount to 120*l.*; all the legacies but this are paid, which has exhausted the assets; for peace sake we have tendered 4*l.* 14*s.* 2*d.* The will was proved before the vicars choral of Exeter; they have examined three witnesses, who have proved nothing material; no inventory is given in because they have not called for one; Elliot has sworn there are not assets.

*Witnesses for Holwell.*

1. William Elliot.—Deponent was apprentice and servant to deceased, who was a tanner for nine years, ending about a year before his death; believes when deponent left him deceased was worth 200*l.*; does not know what effects he left at his death.

2. Elizabeth Green.—Deponent lived with deceased; he left as she believes assets sufficient to pay his debts and legacies, but cannot say what he left; knows he lent money to Mrs. Laving; is not acquainted with deceased's affairs.

3. Mary Laving.—Deceased left, as she believes, sufficient assets to pay his debts and legacies, for she saw some time before his death two promissory notes in deceased's hands, from his brother Andrew to him; one for 70*l.* and the other for 30*l.*; and deponent paid him 30*l.* she had borrowed of him a short time before his death; deceased then told her he did not want the money, for he had 80*l.* in Mr. Bince's hands; he had goods, &c. worth 30*l.*; and lands liable to his debts and legacies, worth 25*l.*; total 265*l.*; all his effects came to his executor.

1. Int. The producent is the respondent's son, but she has no interest in the cause. 2. Int. Respondent married deceased's brother; believes deceased's effects amounted to 200*l.*; does not believe the tender is the full of deceased's effects by 40*l.*

Read the clause in Andrews' will, whereby he left his lands to his daughter, on condition of paying the legacy sued for.

*Evidence for Elliot.*

Her allegation pleads the legacies in the testator's will, and that they are paid; pleads that assets did not come to her hands, and that she has tendered 4*l.* 14*s.* 2*d.* for peace sake.

*Answers of Holwell.*

Admits that all the legacies have been paid but his, and denies that

there are not assets sufficient to pay his legacy. Admits an offer was made to pay him 4*l.* 14*s.* 2*s.*, but it was not a judicial tender.

JUDGMENT.

SIR GEORGE LEE.

As no inventory was exhibited or any proof of deficiency of assets made, and as on the contrary the witnesses had given a probable evidence of assets, and Andrew, the first executor, had taken probate, and had paid the legacies (for any thing that appeared to the contrary) voluntarily, and had in his will assented to this very legacy, I was of opinion, there was a sufficient proof that the testator had left assets enough to pay all his legacies and debts, and therefore confirmed the sentence, which pronounced for William Holwell's legacy, and remitted the cause with 14*l.* costs.

## PREROGATIVE COURT OF CANTERBURY.

ANDERSON against WELCH.—p. 577.

A will sufficiently proved, although no proof could be given either of instruction, or of the handwriting of the deceased.

FIRTH against FINCH.—p. 579.

The capacity of a testator established.

DR. Hay, for William Firth.—Sarah Nicholls, the deceased, made a will 5th November, 1752, Firth executor; will opposed by Sarah Finch, deceased's daughter; deceased died 25th March 1753, a widow, and left several grandchildren by her daughter Rose Firth, wife of the executor, and a grandson, John Nicholls; on 18th January, 1752, in the life of her daughter, Firth made a will, gave residue to her, and made William Firth executor. On death of Rose, she made the will of 5th November, 1752, and gave residue to Rose's children, and made William Firth and John Nicholls her grandson, executors; Nicholls has renounced. Archibald Wynne was employed by deceased as an attorney, on 22d October, he went to visit deceased; she talked sensibly about a cause she had, and told him she would alter her will, fetched it, desired him to read it, and gave him instructions for a new will, conformable to the will pleaded on 24th October, he brought a draft of a will and a duplicate to deceased, read them to her, and she approved them, but declined executing them then because her neighbours, the Darbys, who were witnesses to her former will, were not at home. Wynne went again on 5th November, for her to execute a deed, and she then fetched a will, declared she approved it, and duly executed it about noon of Sunday, 5th November. She then declared she would leave one duplicate with Mrs. Darby, which she did; and the deceased directed her in case of her death to deliver it to Jacky, her grandson; about three weeks before her death, deceased declared to John Nicholls, that she had made him her executor, and told him the contents of her will in manner as it appears, and said she had done so because her daughter Finch's husband had used her ill; admit

she had affection for her daughter Finch; question is only as to deceased's capacity; they say she was incapable from drinking; there is a mistake in the spelling of her name to the will and the duplicate; but deceased herself took notice of it.

*Dr. Paul*, for Finch.—Strong affection for Sarah Finch; deceased was drunk every day for a year before her death; could not count money. On the 24th October, put off executing the will. Wynne swears she examined the duplicates alternately; she was not in a condition to do so from drinking; she was incapable before, at, and after the execution of the will. Mr. Wynne brought his daughter with him, and met Firth and his sister at deceased's; deceased did not know how to write her name; she had not a legal capacity to make a will.

Witnesses for Firth.

1. Archibald Wynne.—Deponent knew deceased seventeen years, and married her husband's niece; on the 22d October, 1752, deponent went to Aldenham, and there visited deceased; she told him she wanted to alter her will; made deponent read it; talked over her legacies, and varied them till she brought them to her mind; as deponent best remembers he minuted down the instructions; deponent advised her to have a duplicate, which she approved; 24th October, deponent carried them to deceased, and read them to her audibly, she well understood and approved them, and she examined them alternately as deponent read them respectively to her; deponent then proposed to her to execute them, but she told him her neighbours the Darbys were from home, and therefore she would stay till another time; he then proposed to her to send to the next village for witnesses, but she said it would make a fuss, and she would stay till he came again, and would read them over again; deponent left them. On the 5th November, 1752, deponent went to deceased to execute a deed to which she was a party; deponent's daughter went with him to Aldenham; they first went to deceased's, and there found Firth and his sister; deceased executed the deed and then fetched the will and duplicate to execute them; deponent asked her if she knew the contents, and had heard them read? she said, "Yes;" deponent then altered the date from the 24th October to the 5th November; deceased in a quick manner asked him what he was writing in her will; deponent told her he was only altering the date, and she was satisfied; deceased duly executed them, and the witnesses at her desire attested them, and the deceased declared she would lodge one duplicate with Mrs. Darby, and keep the other herself; deceased asked deponent and his daughter to dine with her, but they were engaged; deceased was of sound mind, &c.

2. Int. Deceased had great affection for her daughter Finch, but an aversion to her husband. 5. Int. Deceased left about 1000*l.* or 1100*l.*; she was perfectly sober when she gave the instructions; and deponent can positively swear she knew the effect of the devise of the residue, and that she knew the value of the residue, and said, as Mr. Finch had treated her with contempt, but on the contrary Mr. Firth had acted well towards her, she therefore would give all the residue to her daughter Firth's children. 9. Int. Deceased had long loved drinking, but she was not always drunk, and was a woman of good sense. 19. Int. Deponent has received his legacy by a note from Firth.

2. Catherine Firth.—Knew deceased ten years; was present on the 5th November, 1752, when deceased executed her will, and declared it

was to her mind ; confirms Wynne as to what passed about altering the date ; proves the due execution and capacity, and says she is a witness to the will.

2. Int. Deceased had affection for Mrs. Finch. 7. Int. read. Was not deceased pressed to execute the will ? Answers in the negative, and says it was quite her own choice. 9. Int. read. Did deceased constantly drink, and was incapable ? Answers, Has heard deceased drank too much : otherwise answers in the negative. 12. Int. Deceased did know the effect of her will, and was sober at the execution of it. 18. Int. Respondent was with deceased an hour before the will was executed ; went to visit deceased at her own request.

3. Elizabeth Wynne.—Agrees with the other witnesses ; proves execution of will and duplicate, and says she was a witness to them, and that deceased was of sound mind, &c.

8. Int. Will was executed before dinner. 12. Int. Believes the deceased knew contents of the will. 13. Int. Verily believes deceased was perfectly sober ; deceased took notice she had left out a letter of her name, the deponent's father said it did not signify. 18. Int. Deponent was with deceased a quarter of an hour before she executed the will.

Will read.

Witnesses for Finch.

1. Mary Mardell.—Well knew deceased ; proves affection to Sarah Finch ; for near two years or more before her death deceased drank excessively and hurt her understanding thereby ; for the last six months she could not count the change of a guinea. In October, November, and December, 1752, was commonly drunk and gave deponent improper orders for meat ; could not reckon her money in paying her bills.

2. William Barton.—Knew deceased forty years ; proves affection to Sarah Finch ; deceased grew senseless towards the last, but before was a very sensible woman ; for two years before her death drank excessively, and had impaired her understanding ; for eighteen months before her death she was incapable of managing her affairs, and had lost her memory for twelve months ; she was esteemed mad.

3. Elizabeth Buckle Moor.—Knew deceased forty years ; affection to Finch ; deceased was a sensible woman ; for near two years before her death drank hard ; for six months hardly ever sober, and behaved like a mad woman, threatened to destroy herself, could not reckon her money, and had lost her memory ; verily believes for twelve months she was incapable of making a will from excessive drinking ; deceased said she had never been in her senses since Molly, meaning her daughter, died ; in the said Molly's illness, deceased would swear at her, and bid her get up, and said she was well enough ; deceased was in a state of madness, and would curse and swear and abuse people ; used to forget she had paid people to whom she owed money.

4. Mary Watkins.—Knew deceased for a year before her death, and was servant to her ; deceased was scarce an hour in her senses, was always drunk, and incapable of making a will, threatened to drown herself, and talked madly ; could not count the change of a guinea ; deponent has paid a guinea a week for rum, &c. for deceased's drinking. Saturday, 4th November, 1752, deceased was very drunk and mad, and towards the evening sent deponent for quart of rum, and that evening and in the night drank near half of the quart, and by eight in the morning had drank near the whole ; and was very drunk and incapable of

doing any thing before, at, and after the time of the execution of the will; verily believes deceased was quite insensible.

3. Int. Deponent and her fellow-servants noted at that time that deceased was not capable of business.

5. Hannah Leach.—Deponent was servant to deceased; on the 5th November, 1752, while deponent lived with her she never went to bed sober but once; from October, 1751, when her daughter Mary died, she was quite mad, and talked of hanging or drowning herself; deposes the same as the last witness, as to drinking rum on the 4th November, and as to her being insensible before, at, and after the execution of the will; deponent and Watkins observed to each other that deceased was incapable of doing business.

6. Thomas Smith.—Deceased was a sensible woman, but for two years before her death her senses were impaired; she was mad for twelve months, and incapable of making a will; deponent was at the deceased's house every Sunday morning; was there on Sunday morning, 5th November, 1752; she was very drunk at the time of executing her will.

7. Mary Smith.—Knew deceased fifteen years; affection for deponent, deceased daily was drunk, for two years before her death was incapable of managing her affairs, and sometimes could not count money; swore at her daughter Mary, when she said Mary was dying.

12. Int. About a fortnight before deceased died, she told deponent it was her desire her daughter Finch should have her mare and chaise if she died, and bid deponent take notice of it; deponent said, "If you don't tell Mr. Nichol, or have not set it down in your will; he won't mind what I say;" she replied, "Why then, I will tell it to two or three more old women, for may-be I shan't live to see him myself, and as it is her desire, I would have her have it, and as to the rest, let them take it amongst them."

8. Samuel Gap.—Has seen deceased write; she spelt her name "Sarah Nichol."

9. Edward White.—The same.

Witnesses for Firth.

1. John Nicholl, examined August, 1753.—Deceased was deponent's grandmother; deceased was before and after 5th November, 1752 very capable of doing business, and in August, 1752 executed a release, and received rents for deponent; she managed her affairs with good economy, regularly paid her debts; knows deceased had for several years great disregard for William Finch, on account of his ill treatment of her, and she often complained of him to deponent; deceased had a great regard for William Firth and his children; he was joint executor with her to her husband, and he chiefly acted therein; Wynne did business for deceased and her husband, and made several wills for her, and made her husband's will, and deceased always consulted Wynne. About three weeks or a month before her death, deceased being of sound mind, told the deponent she had made her will, and had made the deponent joint executor with William Firth, and mentioned part of the contents of such will, and her reasons for making it different from her former wills, telling him it was because Mr. Finch had always behaved himself so ill to her, and added, that she had promised her daughter Finch her horse and chaise, and as she had left them so little in her will she was desirous she might have it, and had therefore already mentioned it to Firth, and now mentioned it to deponent, that it might be confirmed, as it was not set down in the will.

1. Int. Respondent has renounced the executorship, and has received and released his legacy; respondent has a greater interest under an intestacy than under the will. 7. Int. Has heard deceased say she would make Firth amends in her will for the trouble he had in his executorship to her husband.

2. Dinah Darley.—Deponent and her husband were witnesses to the deceased's cancelled will; the deceased was of sound mind long after the execution of the will pleaded, and managed her affairs; she had great disregard for William Finch, and great regard for Firth, who assisted her very much in her affairs; after the death of her daughter, Rose Firth, deceased took out of deponent's hands the duplicate of her will, and said she should soon bring her another paper to keep, when she could get it prepared; in November 1752 deceased delivered to deponent a paper sealed up, and marked "S. N." with her own hand, and said she had so marked it that it might be known it was her own doing, and desired deponent at her death would deliver it to Mr. Firth, or her grandson, John Nicholl; deponent desired her to name which, and she said "Jacky," and then said her daughter Finch was a good girl, but spoke slightly of her husband; deponent delivered the said paper to John Nicholl after deceased's death; deceased had no near neighbours but deponent's family, except cottagers.

3. William Day.—Before and after date of the will deponent has conversed with deceased, and she talked very sensibly.

4. Edward Finch, jun.—Deceased's last illness began on 3d February 1753; deponent swears deceased was, long before and after the date of her will, capable of making a will; never saw her drunk but once.

4. Int. The time he saw her drunk, she remembered what she had said.

5. Richard Darley.—Deponent and his wife were witnesses to deceased's cancelled will; she was capable of making a will before and after the date of the will pleaded; she paid 2*l.* to deponent for faggots on 21st July 1752, and 1*l.* 8*s.* for wood on 26th December 1752, and paid deponent a year's window tax on 19th October 1752.

6. Sarah Foulkes.—The deponent was servant to William Firth; knew deceased, but never knew her to be out of her senses.

7. John Nicholl.—Deponent was servant, and afterwards tenant to deceased to her death; never saw her drunk but once, and had frequent dealings with her; she transacted her business well; deponent saw her two or three times a week; she bought wood of deponent in the year 1752, and paid him without making any mistake, and seemed to be perfectly in her senses.

8. Esther Pates.—Deposes to deceased's good capacity.

9. John Saunders.—Deponent did work for deceased as a carpenter; she regularly paid him to her death, without making any mistakes.

Cancelled will read.

Witnesses for Finch.

1. Edward White.—Proves the name "Sarah Nicholl" to two receipts for rent to Gap to be deceased's handwriting.

2. Mary Watkins.—Firth threatened deponent before her first examination, and said, deponent was a base woman to expose her mistress.

3. Mary Smith.—Deposes to a quarrel between deceased and her daughter, Rose Firth, and that deceased never saw her afterwards.

4. Charles Poulton.—Deponent knew but little of deceased, but was with her in June 1751 and Michaelmas 1752, about a house of hers.

## JUDGMENT.

SIR GEORGE LEE.

The only question being, whether deceased had sufficient capacity to make a will, I was of opinion, from the evidence, that she had sufficient capacity, and therefore pronounced for the validity of the will, but did not give costs.

N. B. The counsel for Firth pressed to have costs, from the time that Finch gave in her last allegation.

## ARCHES COURT OF CANTERBURY.

HUNT against SARELL.—p. 589.

*(Appeal from Exeter in a Cause of Legacy.)*

The identity of a legatee established.

Dr. Simpson, for Sarell.—John Hunt died in 1740, made his will, and gave to Richard Sarell 20*l.*, to be paid by his executor, and appointed Wilmot Hunt, his wife, executrix and residuary legatee. She took probate 20th February 1740, and paid all the legacies but this; has not denied assets; in April 1744, Sarell brought a suit for this legacy. Hunt appeared; a libel given in, to which she gave a negative issue; deceased and Sarell were second cousins; we pleaded affection for Sarell, and that deceased intended this legacy for Richard Sarell, the respondent, and not for another Richard Sarell of Chadford, who was likewise cousin to deceased, but for whom deceased had a dislike; Sarell of Chadford, has released all interest to Richard Sarell of Chudleigh, the respondent. Respondent was abroad from the commencement of the suit till 1752, during which time the cause lay still; the Court at Exeter pronounced for the legacy, but condemned Sarell in 1*l.* costs. Hunt appealed from the judge below, having pronounced for the legacy, but we have not appealed from condemning Sarell in costs.

Dr. Bettesworth, for Hunt.—The cause was depending from the 2nd April 1744, to 23d November 1753, when sentence was given for the legacy. Deceased had two cousins, named Richard Sarell. Richard Sarell of Chadford, has demanded the legacy; the uncertainty of the person of the legatee makes the legacy void.

Witness for Sarell.

William Sarell, baker.—Deponent well knew deceased and plaintiff; they were cousins; deceased expressed particular regard for plaintiff; about sixteen years ago, deponent called on deceased, and he went with deponent to see plaintiff, who is deponent's brother; deceased gave plaintiff several real estates by his will; believes he never intended to leave anything to Richard Sarell of Chadford, for deceased had a great dislike to him; Mrs. Hunt declared she was willing to pay the legacy if she could be satisfied which Richard Sarell deceased meant; proves the release executed by Sarell of Chadford.

Int. Believes Richard Sarell of Chadford has demanded the legacy.

Release from Richard Sarell of Chadford read, in which he recites, that he knows deceased intended the legacy in question, for Richard



Sarell of Chudleigh, and therefore he released to him all the interest he is supposed to have therein.

*Dr. Simpson's* argument for Sarell.—*Lord Cheney's case*, *Coke's Reports*, Witnesses received to ascertain who the testator intended to leave a legacy to. *Littlebury* and *Buckle*, the same. Hunt has not put it in issue that there is another Richard Sarell besides the plaintiff, who was cousin to deceased; only a general negative issue given; she has not pleaded. We have shown deceased had affection for plaintiff, and that he declared he would benefit him by his will.

*Dr. Bettesworth*, *contra*.—Two witnesses necessary to prove identity. William Sarell proves nothing. One witness, I admit, is sufficient to prove a release. 2 Peere Williams, f. 152, *Pitcairne* against *Brace*, the widow is entitled to the legacy from the uncertainty who the testator intended to be the legatee.

#### JUDGMENT.

SIR GEORGE LEE.

I was of opinion one witness was sufficient to prove identity, which is a collateral question; but here the release of Sarell of Chadford, by which he disclaimed all right to the legacy, and declared he knew the testator meant the plaintiff, fixed the identity of the legatee by more than one witness, and as it was in evidence that the deceased had a great regard to the plaintiff, and a great dislike to the other Richard Sarell, I had no doubt but that the legacy belonged to the plaintiff, and therefore confirmed the decree of the judge below, as to pronouncing the legacy was due and payable to Richard Sarell of Chudleigh, and condemned Hunt in the costs of the appeal.

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## COURT OF PECULIARS.

GRANT against GRANT.—p. 502.

A suit for restitution of conjugal rights, in the case of a Fleet marriage; the marriage established.

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## PREROGATIVE COURT OF CANTERBURY.

BROTHERTON. Executor of LADY COOKES WINFORD against HELLIER, by his Guardian.—p. 599.

A party who has no interest, cannot be permitted to intervene in a cause.

*Dr. Bettesworth*.—Samuel Hellier, Esq. deceased, left a widow, Lady Cookes Winford, and a son, a minor, aged 18 or 19 years; he chose Sarah Harris to be his guardian, and she was appointed such to propound deceased's will on behalf of the son, which Lady Winford opposed; the minor has a grandmother living, Sarah Huntback, who is a witness in this cause; she and Dean Lyttleton are appointed guardians for his person and real estate in Chancery; the grandmother now prays that she may intervene to see justice done the minor in this cause; if the minor

should die she is his next of kin. The proctor for Lady Winford might have objected to Harris's being guardian; the only objection in the act is, that her intervention will increase expense.

*Dr. Hay*, for Samuel Hellier.—The cause is now ready to be heard; Sarah Huntback, the grandmother, prays to intervene. Harris was appointed guardian in 1752, upon the minor's election; nobody opposed her being guardian; the grandmother might then have interposed. Huntback has been examined as a witness in the cause; no reason for her intervention; the cause is concluded; she cannot plead; no other effect can arise from her intervention but burthening the cause with the expense of counsel and proctor for her, and more copies of the depositions; if she will appear at her own expense, we will not oppose it.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion this motion was new; it did not appear to me that her intervention could be of any use; it was not suggested that the guardian was colluding with the adverse party; that it was unprecedented to admit any person to intervene that had no interest in the cause, and therefore I rejected Sarah Huntback's petition.

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#### WISE and Others against JOHNSON.—p. 600.

A codicil admitted to probate, which had not originated with the deceased, but which had been approved and executed by him.

*Dr. Pinfold*, for Johnson.—William Johnson, a pawnbroker, deceased, died a widower, without children; on 30th May 1753 made his will, dated 2d May 1753, all wrote by himself. This will is not disputed. Appointed Wise, Brown, and Harrison, his executors, and left the residue to his father. William Johnson, the father, has propounded a codicil, dated 21st May 1753, which is opposed by the executors of the will. Harrison and Brown were indebted to deceased. The codicil does not materially alter the will; it recites that Harrison and Brown are indebted to deceased; that the making them executors may be an extinguishment of their debts, which he does not intend; and therefore declares them trustees for his father, whom he makes his residuary legatee; appoints his father, William Johnson, joint executor with the others named in his will, and gives a legacy of five pounds to Mrs. Deborah Dorrell, which is added in deceased's own hand-writing. One Singleton, a friend of deceased's, informed him that it might be a dispute whether making Brown and Harrison executors would not extinguish their debt; Walton, deceased's apothecary, at his desire, read the codicil to him on the morning of 22d of May; he approved of it, and would then have executed it, but Walton advised him to send for his will, and compare them together; deceased executed the codicil in the evening of 22d May, 1753: and it is attested by Walton and Deborah Dorrell; recognition of the codicil on 23d May; admit Singleton had not previous orders from deceased for preparing the codicil.

*Dr. Paul* for Wise and others.—In the will deceased gives the interest of 1400*l.* to his father and mother for their lives, remainder to his sister's children; if she has none, to his next of kin; leaves the residue, which is

about 600*l.* to his father absolutely ; father applied to William Richardson to get deceased to make him and said Richardson executors ; Richardson said he would not be an executor, but spoke to deceased to make his father executor ; deceased said " No ; my father shall not be executor." The father afterwards applied to Singleton for the same purpose ; Singleton wrote the codicil at an ale-house in Fleet-street, and sent it to deceased. We insist that the codicil was a fraud on the deceased ; rely on custody and imposition, but do not object to capacity.

Witnesses for the Codicil.

1. William Singleton.—Deponent intimate with deceased ; deponent having heard that Brown and Harrison were executors to deceased, and indebted to him in 800*l.* ; deponent wrote to deceased, and acquainted him that, by making them executors, he would extinguish their debt ; deponent drew the codicil pleaded, and sent it to deceased with said letter, by his father ; the legacy in codicil to Mrs. Dorrell is wrote by deceased ; deceased, on 23d May, told deponent he had executed said codicil ; deceased would have had deponent write said codicil on the will, and said he would execute it again, but deponent told him it would be as well to seal it on to the will, which deponent did ; deceased was then of sound mind, &c.

2. Int. Deceased did not give instructions for the codicil. 5. Int. Respondent contrived it.

2. John Walton, apothecary.—On 22d May, 1753, in the morning, deponent went to deceased, and found him reading a letter which deceased gave deponent to read ; it was a letter from Singleton ; deponent read it and the codicil to deceased, and by deceased's order, deponent burnt the letter ; deceased said he would then execute the codicil, but deponent advised him to send for his will first ; in the evening deponent went to deceased again, and he said he would then execute the codicil, and he did execute it in presence of deponent and Deborah Dorrell, who attested it ; the deceased was of sound mind, &c. ; the deceased with his own hand inserted the legacy to Dorrell in deponent's presence.

6. Int. Gives an account of the contents of Singleton's letter. 8. Int. Respondent and Dr. Schomberg ordered deceased should be kept quiet, and see no company unnecessarily.

3. Deborah Dorrell.—Deponent well knew deceased for seven years before his death ; Walton told deponent that the deceased desired her to set her name to the codicil ; deponent said she could not write, but deceased said she might set her mark, which, at deceased's request she did, but did not see deceased sign, or hear him publish it ; he was of sound mind, &c.

2. Int. Believes the codicil was drawn at the request of deceased's father. 8. Int. Wise, who was deceased's uncle, was often with him, but deceased's father bid deponent not let deceased see Brown and Harrison. 9. Int. Deponent has received her legacy.

4. Thomas Dunson.—Proves the legacy to Dorrell to be the deceased's handwriting.

7. Int. Brown was indebted to deceased. 1. Int. Has heard the father applied to Singleton to get deceased to alter his will.

Codicil read.

Witnesses for Wise and others.

1. William Richardson.—Brown and Harrison were intimate with deceased ; about a week before deceased's death, Johnson told deponent

that deceased had made his will, and Brown and Harrison his executors, and desired deponent to ask deceased to make him and deponent executors; deponent refused to be executor; deponent spoke to deceased one day when they were airing in a chariot together, to make his father executor; deceased seemed very uneasy thereat, and asked deponent what his father wanted, and said his father should not have the management of his affairs; deceased was much vexed at it, and fainted; deceased said afterwards that he had been talking to his father, and his father told him he was very well satisfied with his will, and deceased said it was to his father's satisfaction.

2. Hannah Blakeley.—Deponent was servant to deceased; Wise was uncle to deceased, and the other executors were intimate with him; about a fortnight before deceased's death he went abroad with Richardson in a chariot, and returned home very ill, and said his father was the occasion of his illness; a short time before that the father and Thomas and Matthew Galston asked deponent to let them see deceased's will; deponent told them she could not, for it was locked up in his bureau; and Wise had the key; Matthew desired deponent to take the key out of Wise's pocket, after he was a-bed, and get the will; deponent said she would, and he said he could then get a key made by that; Matthew Galston came again at night, according to appointment, to know if she could get the key, but deponent then told him she could not get it; a day or two after, at four in the morning, the father came to deponent's bedside, and begged her to get him the will or the key; the father ordered deponent not to let deceased see Brown or Harrison, and he bid deponent tell Dorrell, after deceased's death, that he would pay her her legacy, if she would be a witness for him.

3. Int. Has heard Harrison owed deceased money on bond.

3. Deborah Dorrell.—Deceased had a great opinion of his executors; about a week before his death deceased said he was relapsed, from his father's teasing him about a thing he would never agree to; the father forbade deponent to let Brown and Harrison see deceased; deceased did not execute the codicil in deponent's presence, nor did Walton attest it in deponent's presence; deceased said nothing at that time, but bid deponent make haste, for he must go to bed.

Int. Has heard Harrison say, he owed deceased money on bond.

4. Walter Rochford.—Deceased had by him in pawns, about 5000*l*. when he died; Gunson, in deponent's presence, said to deceased's father, it was an easy matter to make a dying-man do any thing, and Gunson bid deponent not to take notice of it, if the father took any thing out of deceased's house after his death; Singleton told deponent he made the codicil at an alehouse, without instructions from any one.

5. William Payne.—Gives good characters of the executors; the father seemed uneasy when deponent was with deceased, and believes he refused admittance to deceased's friends; deponent suspected a management by the father, and therefore went to see deceased, but he would not, at that time, let deponent see him; Singleton said he made the codicil by the father's desire.

2. Int. Deponent was told deceased must not see company.

6. Jeremiah Robins.—About fifteen days before deceased's death, deponent went to see deceased, but did not see him.

7. Thomas Lambert.—The deceased had great regard for his executors.

8. John Dickenson.—The same ; and gives them good characters.

9. Daniel Hall.—The same.

JUDGMENT.

Sir GEORGE LEE.

I said, though the deceased had not ordered the codicil to be drawn ; yet his approving and executing it was the same thing,—that it fully appeared to be his mind, by inserting, with his own hand, the legacy to Dorrell ;—that he had a good foundation for making it, as he did not intend his executors should avail themselves of their debts, though the father had behaved improperly ; yet, as deceased was admitted to be in his senses, and no fraud or imposition on him, with respect to this paper was proved, I pronounced for the validity of the codicil, but did not give costs, and at the desire of the proctor for Wise and others, that the probate should not go under seal till after fifteen days, I ordered accordingly.

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Appealed.—Affirmed in Delegates. (a)

(a) The cause in the Assignment Book of the High Court of Delegates, is entitled *Wise and Brown v. Johnson* ; the final sentence was given on the 5th June, 1755. The Judges present were Mr. Justice Foster, Mr. Baron Adams, Mr. Justice Bathurst, Dr. Simpson, Dr. Collier, Dr. Ducarel, and Dr. Clarke. The sentence was as follows :—"Major exhibited his appeal ; Gostling confessed the identity and subscription. The proctors on both sides corrected definite sentences in writing, which for their respective parties they prayed to be read, and promulged, and given. The Judges having heard advocates and proctors on both sides, ordered the sentence corrected by Gostling, to be read, which was read accordingly, pronouncing, decreeing, remitting, and doing in all things as therein contained. Gostling corrected a bill of expenses ; the Judges taxed the same at the sum of 50*l.* of lawful money of Great Britain, besides the motion ; Gostling made oath of the necessary expending of the same. Motion for payment thirty days after service. Many witnesses present.

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KEELING against M'EGAN.—p. 607.

A seaman's will made to secure a debt, pronounced to be void.

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ARCHES COURT OF CANTERBURY.

LEWIS against JAMES.—p. 612.

(*Appeal from Landaff.*)

A proceeding against a churchwarden, respecting his accounts, held to be vexatious : suit dismissed with costs.

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ROBINS against Sir WILLIAM WOLSELEY.—p. 616.

*Appeal from Litchfield in a Grievance.*

In a suit for adultery brought by the husband, the wife appears under protest, and alleges a prior marriage.

The question of the former marriage must be determined before the question of adultery is gone into.

*Dr. Paul* for Mrs. Robins.—This suit was described below, Sir William Wolseley against Lady Wolseley, and was brought by Sir William against her as his wife, for adultery, in order to obtain a divorce. A proctor appeared for her under protestation, and alleged her name was Ann Robins, and that she was and is the wife of John Robins, Esq. 12th February 1754, Sir William's libel given in, in which he pleaded that he was married to the defendant on 25th September 1752. The libel admitted quatenus, and the judge decreed for Mrs. Robins's answers to the marriage pleaded by Sir William. He allowed no time to extend our protest. We have pleaded in writing that she married Mr. Robins on 16th June 1752; this allegation was not opposed, and stands admitted. At the same time her proctor made an allegation apud acta, and protested against going into the cause till the validity of her marriage to Robins was determined. The judge rejected her whole petition, and admitted and swore a witness on the libel. Mrs. Robins has appealed from the act of 26th March 1754.

*Dr. Simpson*, same side.—Mrs. Robins's proctor alleged a misnomer on his first appearance under protest. 12th February 1754, libel admitted, and Robins's proctor gave a negative issue. The Court decreed for her answers. We protested of appealing therefrom. On 26th February, her proctor declared he would give in an allegation in writing, pleading her marriage to Robins. On 26th March, said allegation was given in, and her proctor prayed Sir William Wolseley's suit should stop, and prayed Sir William's answers to her allegation, which had been admitted without opposition; the Court decreed for her answers to Sir William's libel, and admitted a witness upon it absolutely, but did not decree for his answers to her allegation. At the same time an allegation apud acta was offered on behalf of Robins, but rejected by the Court. All these are grievances; but the principal grievance was in proceeding in Sir William's cause while the question of her marriage to Robins was undetermined. The appeal is from the act of 26th March 1754.

*Dr. Pinfold* for Sir William Wolseley.—Citation 9th October, 1753. On 23d October, Robins's proctor appeared under protest. On 26th March, she gave in an articulate allegation, which is admitted. Same day her proctor alleged, and prayed apud acta that Sir William's suit may be stayed.

Act of 26th March 1754 upon which the appeal is brought.

*Tindall*, proctor for Robins, prayed her articulate allegation to be admitted, and a decree against Sir William to answer to it, and alleged that Sir William's pretended marriage and suit was subsequent in time to her marriage to Robins, and that it tended to prove Mrs. Robins guilty of bigamy, and therefore prayed that Sir William's suit may be suspended till the Court had determined on her plea. *Howard*, proctor for Sir William, declared he did not oppose the articulate allegation, and prayed the certificate of the decree for Robins's answers to Sir William's libel to be continued.

Richard Wolseley appeared; alleged he was excommunicated for being present at a clandestine marriage, and prayed to be absolved, and to be admitted a witness on Sir William's libel. The judge absolved, and admitted him a witness, and rejected Robins's allegation apud acta, and petition.

*Dr. Paul* for Robins.—No allegation admitted till 26th March 1754;

the protest is the first matter to be discussed; the judge rejected our prayer for Sir William's answers.

*Dr. Simpson*, same side.—Judge should have assigned a time for extending our protest, but we have not appealed from that; our articulate allegation is *loco responsi*, and the proctor below expressly declared he gave it in as such; if Mrs. Robins gives answers on oath to the libel, she may accuse herself of bigamy, contrary to the known rule that no one is to accuse himself; ordering her, therefore, to answer is a grievance. 2d, grievance, not ordering Sir William to answer to our plea. 3d, Our plea is an absolute bar to the suit, and, therefore, a grievance is done in not staying the suit. 4th, A witness upon the libel ought not to have been received, while our plea was depending; peremptory exceptions may be offered at any time before or after contestation of suit. *Clark's Praxis*, tit. 60, her non-interest may be alleged at any time, and the suit shall be stayed. *Maranta*, par. 6, de Except. nu. 12, peremptory exceptions may be made after contestation. Our plea admits conversation with Mr. Robins; if Sir William's cause and our exception go on together, a prohibition will lie, because the Court in that case will try bigamy. The grand question is, whether this suit on Sir William's part ought not to stop till we have had a determination on our plea in bar? The grievances we complain of are these; 1st, Not staying Sir William's suit; 2dly, Decreeing for Mrs. Robins's answers to his libel; 3dly, Not decreeing for Sir William's answers to our articulate allegation; 4thly, Admitting a witness on the libel.

*Dr. Hay*, same side.—If we had insisted on the protest, that matter must have been determined before any issue could have been given to the libel. I admit a common misnomer cannot be pleaded after contestation of suit, but a peremptory plea may be offered at any time, and must stay a suit. Mrs. Robins cannot answer to the libel, because if she confesses her marriage to Sir William, she must accuse herself of a crime. Our allegation was given *loco responsi*, as her proctor alleged in acts of court; therefore, the certificate of the decree for her answers ought not to have been continued.

*Drs. Pinfold and Bellesworth*, for Sir William.—The protest was waved by an issue being given to the libel; when a Court admits a libel it is in order to proceed to proof; Consist: Lond: (u) *Adams* against *Adams*. Dr. Andrew would not stay this cause as to the cruelty and adultery, till the question on the marriage was determined, but went on with both together; our witnesses may die, and Sir William may be irreparably prejudiced, if his cause is stopped.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion the judge below had done Mrs. Robins injury by his decree. He ought to have stayed Sir William's suit, till it appeared whether Mrs. Robins was married to Mr. Robins previous to the time that Sir William charges her marriage to him, for if she was, her plea was an absolute bar to the suit against her for a divorce for adultery; for if she was married first to Robins, Sir William could not accuse her of adultery, or be divorced from her, because he has no interest, for in that case she is not his wife. 2dly, As her plea was admitted *loco responsi*, she was discharged from answering on oath to the libel; besides

she was not obliged to answer to a marriage with Sir William, when she insisted on a prior marriage to Robins, for if she owned a marriage to Sir William she would prove herself guilty of bigamy. 3dly, As the suit ought to have been stayed, a witness on the libel ought not to have been admitted; and, 4thly, He ought to have decreed for Sir William's answers to her plea.

I therefore pronounced for the appeal; decreed Sir William's suit to be stayed till the marriage with Robins was determined; discharged her from answering to the libel; reversed the admission of the witness, and decreed for Sir William's answers to her plea, and reversed the consideration of costs in finem litis.

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BIRD, alias BELL, against BIRD.—p. 621.

A case of nullity of marriage, by reason of a former marriage, established. Alimony to second wife refused.

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PREROGATIVE COURT OF CANTERBURY.

PLUNKETT, formerly SHARPE, against SHARPE.—p. 623.

When the Court decrees an inventory, it expects a full and satisfactory one to be given in.

*Dr. Collier*, for Plunkett.—Thomas Sharpe, deceased, died in November, 1751, intestate; 13th December, 1751, administration was granted to John Banks, as father and guardian of Ann Plunkett, deceased's widow, and till she came to age; 29th April, 1752, she married Christopher Plunkett; in August, 1753, she being at age, and the administration to her guardian ceasing, she applied for administration in her own right. A caveat was entered in the name of John Thomas; warned 4th September, 1753. *Gostling* prayed administration to be granted to Ann Plunkett. *Bogg* prayed it to be granted to William Sharpe, deceased's brother, and both proctors were assigned to answer to each other's interests. *Gostling* confessed Sharpe's interest, *Bogg* denied Plunkett's interest; she pleaded it, allegation admitted; pleaded public owning and cohabitation, and particularly owning of her as his brother's wife by said William Sharpe; publication on said allegation. *Bogg* gave an allegation, which was admitted. Both proctors assigned to give in inventories. *Gostling* gave in a declaration. *Bogg* gave in an inventory, but defective in form and substance. Deceased's father died in 1747; made his will; appointed his eldest son, William Sharpe, his executor; gave him two-thirds of his estate, and gave the other third to deceased, to be paid at his age of 22; he was past that age when he died. We pray he should set forth the particulars of his father's estate, that it may appear what the third amounted to, which belonged to deceased. At the head, he styles it an inventory of all the goods, &c. of deceased, that have come to his knowledge; and at the end, he admits deceased was entitled to one-third of his father's estate, but says that estate is not yet



liquidated, and that Plunkett is not entitled to an account of it till she has proved her interest.

JUDGMENT.

SIR GEORGE LEE.

I directed that the head of the inventory should be put into the usual form, viz. A true and perfect inventory of all the goods, chattels, and credits of deceased, that have come to the hands, possession, or knowledge of Sharpe; and I said, when the Court decrees for an inventory, a full and satisfactory one was expected; that the third of the father's estate vested in the deceased and was part of his estate, and appeared to be in the hands of Sharpe, and therefore he was obliged to give an inventory of what he had received in money or goods from the father's estate, for the use of deceased, and I decreed accordingly, that he should give in a fuller inventory, and set forth the same, and condemned him in 1*l.* 6*s.* 8*d.* costs.

*Same day, upon a Motion in my Chamber.*

An Intestate leaves a widow and an infant; the widow takes out administration, but becomes lunatic; administration granted also to the aunt of the infant, for the use and benefit of the widow and infant, during the incapacity of the widow, and the minority of the infant.

By Mr. *Farrer*, proctor.—Mr. Binfield died intestate; left a widow and an infant son; administration granted to the widow, who soon became lunatic, is in Bedlam, and utterly incapable of acting in management of the deceased's affairs, of which full proof was made by affidavits exhibited; the estate was small, unable to bear the expense of a commission of lunacy, and there were debts owing to it, which were in danger of being lost, if there were no person to receive them. Whereupon, at the petition of *Farrer*, without revoking the administration granted to the widow, I assigned (upon the renunciation and consent of her grandmother) the infant's aunt to be his guardian, and granted administration to her also, for the use and benefit of the widow and infant, during the incapacity of the widow and the minority of the infant, if the widow should not sooner recover her senses, and directed this administration to be drawn in a special form, reciting the above particulars.

## ARCHES COURT OF CANTERBURY.

FANSHAW against VERDON.—p. 625.

*Appeal from Litchfield in a Grievance.*

A grievance must be heard from the acts in the court below.

CONRAN against LOWE, otherwise DANIEL, calling herself  
CONRAN.—p. 630.

A question touching the validity of a Fleet marriage. Marriage not sufficiently proved.

## HIGH COURT OF DELEGATES.

JUDGES PRESENT.

Right Honourable Sir GEORGE LEE, Mr. Justice WRIGHT, Mr. Justice CLIVE, Drs. JENNER  
and CLARK.

HOPPER against DAVIS and Others.—p. 640.

*Appeal from York.*

The ordinary may order a monument to be taken down, if it is inconveniently placed in a church; if it does not interfere, the parson's authority to erect it, sufficient. The suit in this case was instituted in a wrong form; it ought to have been by articles.

## ARCHES COURT OF CANTERBURY.

102.

142.

FITZGERALD against LADY MARY FITZGERALD.—p. 649.

*Appeal from Consistory, London, on a Grievance.*

In a matrimonial cause, a husband is liable to pay the costs of the wife.

*Dr. Pinfold*, for Mr. Fitzgerald.—Lady Mary brought a suit against her husband for a divorce, for cruelty and adultery. Cause began 2d session of Michaelmas, 1753; By-day, 14th December, bill of costs for 63*l.* taxed against him; 2d session Hilary, 1754, 100*l.* allowed on account for alimony; By-day, Hilary, another bill of costs, 65*l.* taxed; 1st session Easter, a demand for more money; 2d session Easter, 10th May, that demand argued; Fitzgerald made affidavit that he was not able to pay it; the demand was for 48*l.* 3*s.* 2*d.* for the expenses of a commission for examining witnesses in Ireland; the Judge decreed him to pay that sum in fourteen days from that order. We have appealed.

*Dr. Paul*, contra, for Lady Mary.—They were married 14th April, 1747; issue born; 17th October, 1753, citation issued; 1st session Michaelmas, appearance given; 2d session, libel admitted; marriage confessed; a negative issue to the rest; motion for bona ablata, decreed to be restored; decree for answers; gave in very imperfect ones; fuller ordered. Allegation of faculties charged an estate of 1000*l.* a year; answers admitted; a rent roll of 900*l.* a year; 100*l.* on account, allowed for alimony; he went to Ireland. 3d session Easter, a requisition for his answers; delays and expense arose from him. She examined several witnesses in Ireland; could not have the commission returned till she had paid the expenses of it, which amounted to 48*l.* 3*s.* 2*d.* which she made affidavit she has paid; the 100*l.* for alimony not yet paid; he has been in contempt in every step of the cause. We consent the cause should be retained; and when this appeal is determined, we shall pray the cause may be concluded. She had 6000*l.* fortune, and he made a settlement on her of 600*l.* a year.

Act 10th May, 1754, from which he appealed, read.

The judge decreed Mr. Fitzgerald to pay the sum of 48*l.* 3*s.* 2*d.* for the expenses of the Irish commission in fourteen days. The præsertim of appeal from condemning him in the said costs, though he had alleged that he had before paid 65*l.* costs, and is unable to pay the alimony, as appears from his affidavit.

Affidavit of Mr. Fitzgerald.

Swears he had with difficulty paid the last 65*l.* costs, and cannot at present raise money to pay the alimony.

N. B. It was admitted that Lady Mary had actually paid, for the Irish commission, 48*l.* 3*s.* 2*d.*

*Dr. Pinfold*, admitted that by law the husband is liable to pay the costs of suit for his wife, but the Court will consider a man's circumstances; the Chancellor admonished him to pay costs in fourteen days.

JUDGMENT.

SIR GEORGE LEE.

I observed, that the shortness of the time allowed for payment was no part of the appeal; they had appealed only from condemning him in costs, to which he was certainly liable; I pronounced, therefore, against the appeal, confirmed the decree, and gave 45*l.* costs upon the appeal, to be paid in sixty days.

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N. B. Though Mr. Fitzgerald was the appellant, he did not take care to get the process transmitted. Lady Mary, to expediate her cause, was at that expense, which raised her proctor's bill of costs so high upon the appeal.

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#### WINCHLOW, Administratrix of SMITH, against SMITH.—p. 651.

In a cause of legacy, a declaration given in instead of an inventory, pronounced not to be sufficiently full.

*Dr. Jenner*, for Winchlow.—Richard Smith, deceased, made his will, appointed his daughter, Elizabeth, executrix and residuary legatee; she renounced the executorship; administration cum testamento granted to Bateman, a creditor, he is since dead; and then administration de bonis non cum testamento was granted to William Smith, deceased's brother. Elizabeth Smith is dead, and has made her sister, Margaret Winchlow, executrix. She has brought a cause of legacy against William Smith, for the residue of Richard Smith's estate, which vested in Elizabeth, her testatrix, and has called him to give in an inventory. William has given in a declaration instead of an inventory. We have excepted to the declaration, and have proved that he has omitted to charge himself with 122*l.* which he received of Leonard Bowles, and is a part of Richard Smith's residuary estate, and becomes such in this manner. William Cullen made his will, 30th July 1730, and appointed Richard Smith, the deceased, his executor, and gave him a moiety of the residue of his estate; Richard took probate, and after his death, William Smith took administration cum testamento de bonis non to William Cullen, and has received said 122*l.* from Bowles, who was executor to one Rasfield, who owed said sum on bond to Cullen, and thereby Richard Smith's estate,

who was one of Cullen's residuary legatees, is entitled to it. We pray this sum may be decreed to Winchlow.

*Dr. Hay, contra.* Richard Smith died in 1738. On 23d November, 1738, administration cum testamento was granted to Bateman, and after his death, to William Smith. Margaret is sister, executrix and residuary legatee to Elizabeth Smith. Distribution has been made. Cullen gives many legacies. Admit Smith has received the 122*l.* as administrator to Cullen, but he has paid it away in satisfaction of Cullen's debts and legacies, and he has still demands on him upon Cullen's account. The question is, whether all Cullen's debts and legacies are satisfied? if they are not, this money is no part of Richard Smith's estate.

For Winchlow.

Leonard Bowles.—Proves payment of 122*l.* to Smith, as a debt due to Cullen's estate in August, 1750, to whom Richard Smith was one of the residuary legatees.

Cullen's will.

Gives several legacies and annuities, and then gives half the residue to Richard Smith and Ann his wife.

JUDGMENT.

SIR GEORGE LEE.

I was of opinion, William Smith ought in his declaration to charge himself with this 122*l.* but I had at present no evidence before me to prove that this money was part of Richard Smith's estate, I therefore pronounced that the declaration was not full; ordered him to give in a fuller declaration, and to charge himself with the said sum of 122*l.*; and rescinded the conclusion of the cause, to give opportunity to show that a moiety of the said sum belonged to Richard Smith's estate.

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#### RILER against COUSINS.—p. 653.

A lessee of the vicarial tithes must exhibit the original lease and agreement as the foundation of his claim.

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### PREROGATIVE COURT OF CANTERBURY.

#### HIBBEN against CALEMBERG.—p. 655.

A party in possession of an administration is not bound to propound her interest, till the party calling it in question, has established her own.

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#### FRANCO and FRANCO against ALVARENZA.—p. 659.

When the Court of Delegates affirms the sentence of the Court of Prerogative, and remits a cause, the cause stands in the Court below on the same footing as it would have done had there been no appeal.

**KILLICAN against LORD PARKER and Others.—p. 662.**

All testamentary papers are to be brought into the Prerogative Court, when required. A duplicate is a part of a will, and to be considered as a testamentary paper.

**JONATHAN BLACKWELL**, Esq. deceased, left Lord Parker and others, his great-nephews and next of kin; made his will, dated 2d January, 1744, and appointed Samuel Killican residuary legatee, and made a duplicate thereof; Killican brought in the will and prayed probate; Lord Parker and others entered caveat, and prayed scripts and scrolls; Killican with an affidavit of scripts, brought in a former will, and set forth that he had in his custody an exact duplicate of the will, which he was ready to produce whenever the Court shall order, but declined bringing it in, upon suggestion that the deceased made duplicates for the greater security, and if they should both be lodged in the same place, that security would be defeated; and further suggested, that the will contained real as well as personal estate, and he wanted that duplicate to prove it in Chancery; Lord Parker prayed he might be obliged to bring in the duplicate, for observations may arise upon the view of it.

**JUDGMENT.**

**SIR GEORGE LEE.**

I was of opinion nothing was offered on the part of Killican, but what may not be suggested in every case; that as to proving it in Chancery, the course was for the officer of this Court to attend with the will for that purpose; that if it was to be lodged in Chancery, he could not perform his offer of attending with it at all times this Court should require; that it was the constant rule to bring in all testamentary papers when required, and that a duplicate is part of the will. I ordered it to be brought in, which was done accordingly.



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#### ADMINISTRATION

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tee, and administration cum test. ann. (granted, after citing the executor, to the son's attorney in 1828,) being brought in, the Court, doubting whether it ought not to require the ambassador's certificate, ultimately on justifying security and on the French consul-general's certificate, (confirmed by an affidavit) that by the French law the next of kin was entitled to the residue, granted the administration to the son without citing the nude executor, he having never applied for the grant, though the deceased died upwards of thirteen years before. *In the Goods of Anne Dormoy.* 264

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The Court, before granting administration to a creditor, requires an affidavit, (inter alia,) that he has no other security; and if the person first entitled to the grant is abroad, and the service of the decree is on the Royal Exchange, that such person has no agent in this country. *Aitkin v. Ford.* 71

2. Where administration to a person long dead was prayed by a creditor, and there had been no personal service on the next of kin (who had no known agent in this country), the Court required full information as to the debt and the cause of the delay, and that notice should be given to the next of kin in the West Indies. *Miller v. Washington.* 109
3. The Court refused to grant administration cum test. ann. to A. B. as the attorney of the Orphan Board at the Cape of Good Hope acting on behalf of the next of kin, but subsequently granted it to a creditor, the next of kin having been cited by a decree on the Royal Exchange. *In the Goods of John Reitz.* 263

#### ADMINISTRATION

##### de bonis non.

1. When, after the death of a brother administrator, administration had been revoked, because the mother had not formally renounced, that revocation rescinded on the mother's affidavit that she was aware of her son's application for the administration, and had under it received her distributive share. *In the Goods of Frederick Stables.* 204
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2. The Court will not enforce a monition to transmit the original will proved in an inferior jurisdiction, where the deceased died, but will grant a limited administration to assign a satisfied term situate in another diocese.

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#### ADMINISTRATION BOND.

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ADMINISTRATOR.

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AFFIDAVITS.

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Where the evidence did not amount to judicial proof of the wife's adultery, but her conduct had been so culpable as to raise strong suspicions of criminality and induce the Court to rescind the conclusion to admit fresh evidence, proof, that during the progress of the suit the alleged particeps criminis had frequently visited her alone, and remained late at night, will, coupled with the former evidence, found a sentence of separation. *Hamerton v. Hamerton.* 1

ALIMONY.

1. Where both parties have long abstained from applying to the Court—the one for a reduction of alimony, the other to enforce the regular payment,—It will not enforce arrears, nor inquire as to the sums paid by the husband for his wife's debts incurred by reason of non-payment of that alimony; nor will it reduce alimony on account of an express waiver of a part thereof by the wife,—the additional expenses of the husband occasioned by the mature age of children—the failure, from the mismanagement of her trustees, of a portion of the funds set apart for the wife's alimony,—or slight additions, aliunde, to her means. *De Blaquiere v. De Blaquiere.* 126
2. Alimony is allotted for the maintenance of the wife from year to year: the Court, therefore, will not, without sufficient cause shown for the delay, enforce payment of arrears, beyond one year prior to the monition. *id.*
3. After sentence of separation by reason of gross cruelty and adultery on the part of the husband, the real estate being 6000*l.* a year, subject, as alleged by the husband, to large incumbrances, the mother's jointure having been 1000*l.*, and the wife's pinmoney 500*l.* a year, the Court allotted 1000*l.* a year permanent alimony, allowing the husband to deduct from that sum any payment on account of pinmoney, above 200*l.* a year,—the sum agreed to be paid to the wife for the maintenance of the children. *Mytton v. Mytton.* 249
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APPEAL.

1. On an appeal from a definite sentence, the Court rejected an allegation pleading facts not shown to be noviter ad notitiam perventa. *Fletcher v. Le Breton.* 139
2. Sentence of the Prerogative Court reversed, semble on the ground that the facts disclosed in evidence established capacity, and volition, and sufficiently rebutted the suspicion—arising from the relation of client and attorney subsisting between the testator and the executor and residuary legatee—and from the conduct of the latter. *Wyatt v. Ingram.* 183
3. A commission of adjuncts issued, when the parties having entered into a compromise, the sentence was reversed by consent. *Tyrrell v. March.* 186
4. On appeal in a pew cause from condemning churchwardens in costs, held, 1st. That giving or refusing costs is not a matter absolutely unappealable; though such appeals, especially for trifling sums, are much to be discouraged.—2d. That an appeal is perempted by doing any subsequent act in furtherance of the sentence—viz. attending taxation of costs—3d. That churchwardens were properly condemned in costs, where the party proceeded against in substance succeeded, and the suit was rendered necessary by their undue suppression of information.  
If a party does act in furtherance of a sentence, he bars his right of appeal.  
To avoid defeating substantial justice the Court will, as far as it properly can, disregard mere form. *Lloyd and Clark v. Poole.* 187
5. On the refusal of a monition against district churchwardens to join the parish churchwardens in making a rate, the district churchwardens, though no parties to the suit below nor to the decree complained of, may, notwithstanding the formal words of the inhibition, be made the only respondents in an appeal, and the refusal of such monition, being a case within the third exception of the statute of citations, authorises the citing of the parties out of their diocese. Respondents appearing under protest assigned to appear absolutely. Costs reserved. *Cotterell v. Mace and James.* 254
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7. On a grievance must be heard from the acts in the court below. *Fanshaw v. Verdon.* 471
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## ARCHES COURT.

The Court sometimes orders original deeds to be delivered out, which are wanted for other purposes, it only does so on a registration being made of the instruments, and on an undertaking from the party requiring them that they shall be attended with at the hearing of the cause. *Riler v. Cozen*. 368

## ARTICLES.

1. The *præsertim* of articles is construed to set forth the nature of the principal charges—the general words only to include subordinate charges *ejusdem generis*. *Bennet v. Bonaker*. 13
2. The ordinary may order a monument to be taken down, if it is inconveniently placed in a church; if it does not interfere, the parson's authority to erect it, sufficient. The suit in this case was instituted in a wrong form; it ought to have been by articles. *Hopper v. Davis*. 472

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## BRAWLING.

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2. A defendant, on giving an affirmative issue, suspended ab ingressu ecclesiæ for a month, and condemned in costs for brawling on two occasions at a vestry held in the chancel. *Field v. Cozens*. 67
3. On debating the admissibility of articles in a suit for brawling, the question is, whether they contain a substantive charge of brawling and riot in a sacred place: and no occasion nor provocation can exempt from the penalties of the law; nor can the Court listen to a suggestion, that the articles do not truly detail the circumstances.

Articles for brawling, at a vestry held at a room within the church, being only proved in part, the Court monished the defendant to abstain from future misconduct, and condemned him in 20*l.* nomine expensarum. *Jarman v. Bagster*. 139

4. On proof of violent conduct, and great personal abuse, at a vestry held in the room within the church, the Court suspended the defendant ab ingressu ecclesiæ for fourteen days; but, under the circumstances, condemned him only in 35*l.* nomine expensarum. *Jarman v. Wise*. 139
5. In a suit under 5 & 6 Ed. 6, c. 4, not necessary that the witnesses should depose that the party proceeded against chided, brawled, and quarrelled; it is sufficient if they prove that words of brawling were used. *Foot v. Richards and Bartlett*. 368

## C.

## CANCELLATION.

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## CHAPEL.

1. A clerk cannot under 7 and 8 G. IV. c. 72, s. 3, officiate, without consent of the Incumbent of the parish, in a newly erected chapel, consecrated and endowed as a chapel of ease, unless the right of nominating has, by deed under seal been previously declared to be in the endower. *Bliss v. Wood*. 189
2. Under the general law, the erection of a new public chapel (properly so called) requires the joint consent of Patron, Incumbent and Ordinary, and (generally) a compensation to future Incumbents. *id.*
3. The whole cure of souls, and all the emoluments of a parish, belong, under the original endowment, to the Incumbent and his successors, and vest in the existing Incumbent by institution and induction. *id.*
4. The earlier church-building acts, 58 G. III. c. 45, 59 G. III. c. 134, 3 G. IV. c. 72, carefully protect the rights and interests of Patrons and Incumbents, especially existing Incumbents, and 5 G. IV. c. 103, only allows a departure from that principle for a limited time, and under very special circumstances. Semble, that the sole object of 7 & 8 G. IV. c. 72, authorising the church-building commissioners to declare the right of nomination to be in the endower, with lands or money in the funds, of a chapel, without compensation made to the Incumbent, was to encourage such endowments, and that such chapel must (save as to the compensation) be built either in conformity to the general law, or under the provisions of the earlier church-building acts. *id.*

## CHURCHWARDENS.

1. Where the person first elected church-warden, had on payment of a fine been excused, a person, elected in his place, at the same vestry meeting, is bound to serve, unless some exemption be shown. *Birnie v. Weller and Elliott*. 187
2. Churchwardens are entitled to protection, if

- they proceed fairly; if not, they are peculiarly responsible to the Court. 187
3. Churchwardens, and their predecessors, though constantly acting for a whole township consisting of three districts, were uniformly described as churchwardens of A., the principal place in the township and where the chapel stood. In a suit for subtraction of church rate, the Court reversed, with costs in both instances, a sentence sustaining a protest—that the defendant, occupying lands in the township, but not in the district in which A. was situate, was not legally sued by churchwardens thus described. *James and Stanley v. Keeling*. 187
  4. A churchwarden cannot prevent a minister appointed under a sequestration, from officiating in the church. *Prout v. Creswell*. 299
  5. The patrons of a church have no right to controvert the election of churchwardens; unless it can be shown that the parishioners have no right to elect churchwardens, and that the churchwardens of the particular parish are exempt from the jurisdiction of the ordinary. *Leeson v. Trehorne*. 338
  6. A proceeding against a churchwarden, respecting his accounts, held to be vexatious: suit dismissed with costs. *Lewis v. James*. 467

#### CLERGYMAN.

1. To constitute in a clergyman criminal neglect of duty requiring censure and correction, there must be neglect without just cause; but unless such cause be shown, the law will infer its absence. *Bennett v. Bonaker*. 13
2. The minister has, in the first instance, the right to the possession of the key of the church, and the churchwardens have only the custody of the church under him; if he refuse access to the church on fitting occasions, complaint must be made to higher authorities. *Lee v. Matthews*. 66

#### COLLUSION.

1. Collusion is an agreement between the parties, for one to commit, or appear to commit, a fact of adultery, so as to suffer the other to obtain a remedy at law as for a real injury. The law permits no cooperation for such purpose, and refuses a remedy for adultery committed with such intent; but it is not proof of collusion, that, after the crime is committed, both parties are desirous of a separation. *Crewe v. Crewe*. 45
2. The long duration of a criminal intercourse, and delay in applying to the Court, and the indirectness and want of stringency in the evidence, are strong presumptions against a preconcerted scheme to obtain a sentence by contrivance.

A judgment by default against the paramour, and no defence on the part of the wife, are not proof of collusion. *ibid.*

#### COMMISSION OF APPRAISEMENT.

1. A commission of appraisement decreed in the presence of the adverse proctor, without any

- objection taken on his part, held to be final, although the commission was ordered, not to issue under seal for ten days. *Franco v. Alverenza*. 359
2. The expenses of a commission of appraisement decreed to be paid out of the estate of an intestate. *Leggatt v. Leggatt*. 394

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See *Helyar v. Helyar*. 437

#### COMMISSION OF REVIEW.

- A commission of Review is not grantable, unless the Lord Chancellor be satisfied that the principles of law on which the Court decided were wrong, or that the facts were either misstated or misunderstood. *Wyatt v. Ingram*. 183

#### CONDONATION.

1. A facility of condonation of adultery on the part of the husband, leads to the inference that he does not duly estimate the injury, and will induce the Court to look with jealousy at his subsequent conduct. *Timmings v. Timmings*. 22
2. The wife having committed adultery on the first of three successive nights, and the husband, aware, and having full proof of this, sleeping with her on the second, condones thereby the previous adultery, and cannot take advantage of further adultery on the third night. *ib.*
3. On proof of adultery, sentence may be barred—1. by compensatio criminis; 2. by condonation; 3. by active procurement or passive toleration;—and, possibly, by other conduct. *Crewe v. Crewe*. 45
4. Condonation and Connivance are essentially different in their nature, though they may have the same legal consequence. *Turton v. Turton*. 130
5. Condonation may be meritorious: Connivance necessarily involves criminality; and therefore the evidence to establish it should be the more grave and conclusive. *ib.*
6. Condonation is a conditional forgiveness, on a full knowledge of all antecedent guilt. *Bramwell v. Bramwell*. 232

#### CONDUCT OF PARTY.

- If, in a criminal suit, the charges are clearly proved, unaccompanied by circumstances of reasonable excuse or explanation, the court, presuming the promoter acts from a sense of duty, will not inquire into his motives: aliter, if the misconduct be not proved; or, even if proved, be sufficiently accounted for. *Bennett v. Bonaker*. 13

#### CONNIVANCE.

1. An allegation, pleading facts to infer connivance as a bar to the husband's prayer for a sentence of separation, by reason of his wife's adultery, rejected, because, as no single fact pleaded necessarily inferred a knowledge of the wife's guilt, nor a suspicion that an adulterous intercourse had been, or was about to

- be formed; and as the whole, taken together, did not warrant an imputation on the husband of consenting to, or intending, his wife's adultery, his conduct laid in the allegation, even if proved, would not amount to connivance; to constitute which there must be intentional concurrence. *Rogers v. Rogers*. 13
2. A plea of connivance does not necessarily admit adultery. *ib.*
  3. Connivance is a bar to a suit for separation, by reason of adultery, on the principle that "volenti non fit injuria." *ib.*
  4. To constitute connivance, active corruption is not necessary; passive acquiescence, with the intention, and in the expectation that guilt will follow, is sufficient:—but, on the other hand, there must be consent, not mere negligence, inattention, confidence, or dullness of apprehension. *ib.*
  5. Connivance is generally proved by circumstantial evidence. *ib.*
  6. To support a plea of connivance, when no adultery during cohabitation is charged nor admitted, the clearest evidence of intention and consent would be required. *Quære*, whether connivance at adultery during cohabitation is a bar to a suit for long subsequent adultery with a different person. *ib.*
  7. On proof, either directly or presumptively, of the wife's adultery, great inattention on the part of the husband will not bar him. To establish such a defence, he must have been privy to her guilt, or have led her into the crime. *Riz v. Riz*. 21
  8. Great facility in condonation of adultery with A., taking no notice of adultery with B., (of which he could not be ignorant) conduct amounting to an invitation to adultery with C.—not merely to giving free scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt; matrimonial cohabitation, after being in possession of full legal proof of such adultery, are criminal connivance and collusion, barring the husband of relief for his wife's adultery, all happening within two years after marriage. *Timmings v. Timmings*. 22
  9. Conduct amounting to an invitation to adultery, and not merely to giving scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt, is legal prostitution. *ib.*
  10. Where the wife made no defence to a suit for divorce by reason of her adultery, the Court dismissed the suit, on the ground that the husband, having connived at his wife's adultery with A. could not complain of an adultery, nearly cotemporary, with B. *Love-ring v. Lovering*. 27
  11. In a suit for separation by reason of the wife's adultery, connivance on the part of the husband, may be pleaded by the wife, consistently with a denial of her guilt. *Moorsom v. Moorsom*. 28
  12. It is not necessary to show connivance at actual adultery. The Court, from connivance at improper familiarity, will infer corrupt intent as to the result. *ib.*
  13. Connivance of a passive and permissive kind, is to be proved by a train of conduct and circumstances. *ib.*
  14. Passive connivance is as much a bar as active conspiracy, but there must be an intention that guilt should ensue. *ib.*
  15. The husband having proved the wife's adulterous connexion with one individual, five years after separation, of which connexion two children were born, the Court held, that the husband's knowledge of, and consent to, gross indelicacies, or even adultery, with three other persons during cohabitation, would not bar him. *Hodges v. Hodges*. 42
  16. A constant intercourse, continued for four years, between a wife and her paramour, not clandestine, but the common subject of conversation among servants and friends, raises a grave suspicion of the husband's knowledge and acquiescence. *Crewe v. Crewe*. 45
  17. On proof of the wife's adultery, continued for four years, under circumstances which raised a strong suspicion that the husband could not have been ignorant, the Court, after much hesitation and difficulty, granted the sentence of separation, as it could not affect the husband with a direct knowledge of the adultery, and as three witnesses had positively sworn they believed the husband was ignorant. *ib.*
  18. Passive connivance, or toleration, arising from the husband's insensibility to his own honour, or unwillingness to seek redress is a bar to relief; if there be proved a long course of criminal conduct, of which he was, or of which he must be presumed to be cognizant:—he may wait for adequate proof, but no longer. *ib.*
  19. Mere imprudence and error in judgment are not connivance; and in determining whether the husband's behaviour has barred him from relief on proof of his wife's adultery, the honesty of his intentions—not the wisdom of his conduct—is to be considered.
- Affectionate conduct to a wife for many years, no appearance during that time of a wish to withdraw from her society, and the absence of any reason to suppose that the husband knew or suspected her depravity, till very shortly before she left him, tend most strongly to disprove connivance at the turpitude of, or active co-operation in, the prostitution of a wife. *Hoar v. Hoar*. 51
20. The adultery of the wife being proved, but she having, with her children, but without her husband, resided in a gentleman's house (of which she was treated as the mistress, and where she was delivered of three children), without the husband sufficiently accounting for his absence, or providing for her, or interfering with such residence, the Court dismissed her, on the ground that the husband, by such conduct, had consented to the connexion and adultery. *Michelson v. Michelson*. 56
  21. To establish connivance, in bar to a suit on account of the wife's adultery, it is not necessary to show knowledge of, and privy to, the actual commission of adultery; such extreme negligence to the conduct of his wife, and

- such encouragement of acquaintance and familiar intimacy, as are likely to lead to an adulterous intercourse, are sufficient. *Gilpin v. Gilpin*. 58
22. In a suit for separation for the husband's adultery with his wife's sister, proof that the wife, after knowledge of previous adultery, allowed under peculiar circumstances, this sister to accompany them to India and to live in the same house with them, will not bar the wife on the ground of connivance: her conduct, though imprudent not being traced to a disregard of her own honour, nor to any motive necessarily criminal. *Turton v. Turton*. 130
23. The Court, or the husband's counsel, may take the objection of the wife's connivance when it clearly appears on the evidence adduced by her: but *quære*, whether such a defence can be set up on interrogatories alone; at all events, to support such a defence so set up, the conduct and evidence to prove it must be most unequivocal and incapable of explanation. See *Dennis v. Dennis*. 135, n.

## COPYHOLDERS.

1. Held that copyholders are not within the provisions of 12 Car. 2, c. 24, s. 8, consequently that it was not competent to them to dispose of the custody of their infants, but that the custody was in the lord or others according to the custom of the manor. 341, n.

## COSTS.

1. Costs are peculiarly in the discretion of the Court; and though the general rule is, that a legatee, loco executoris, propounding and establishing a paper is entitled to costs out of the estate, his unwise delay in producing the paper, and thus occasioning the suit, is a ground for refusing them. *Headington v. Holloway*. 110
2. On a petition for a commission of review, the Lord Chancellor has no authority upon the question of costs. *Wyatt v. Ingram*. 183
3. When a detailed bill of costs has been delivered and long acquiesced in, and payment made after the suit was at an end and when the party was not inops concilii, the party would not be entitled to have it referred to the registrar for examination: aliter where the payment took place without a detailed bill, and application for reference to the registrar was made shortly after the delivery of the bill. *Peddle v. Tuller*. 112
4. A client is under all circumstances entitled to a detailed bill from his proctor. *ib.*
5. Where costs are given against a party, the Court in order to carry its sentence into execution, is empowered to tax the costs and to enforce payment; but as between proctor and client, the Court has no such authority; it can neither decide what shall be paid, nor can it enforce payment. *ib.* 115
6. In a suit for separation for the husband's adultery, the Court will not direct the husband to give security for costs, on a sugges-

- tion, unsupported by affidavit, that he was going abroad. *Turton v. Turton*. 130
7. Costs given against a party who had filed a bill of discovery in the Court of Chancery, then proceeded to call for an inventory in the Ecclesiastical Court; and afterwards abandoning the latter suit, had revived the bill in Chancery. *Radcliff v. Venfield*. 369
8. The interest of a father established, but without costs. *Cox v. Thompson, alias Smith*. 370

## CRIMINAL SUIT.

1. In a criminal suit against a clergyman of unimpeached moral character,—remote charges of omission or irregularity in performing divine service, being shown generally not to be "without just cause:" more recent charges, being completely rebutted: no neglect of duty being imputed for the two years next before the institution of the suit: the clergyman, as to one charge of misconduct, having erred from mistake: and as to two of the remaining charges, (one of which totally misrepresented the fact,) having acted properly:—the Court pronounced the articles not proved: and, as no fair ground for a suit existed at the time of its institution, dismissed the defendant with his costs. *Bennett v. Bonaker*. 13
2. In a criminal suit, the Court is strictly confined to the offences charged in the articles. *ib.*
3. In criminal suits the Court will sometimes inquire into the motives of the promoter, but it will presume proper motives unless there be strong proof to the contrary. *Jarman v. Wise*. 139
4. In a criminal suit for smiting under 5 and 6 Edw. VI. c. 4, the proof must not admit of a doubt. Two concurrent sentences, pronouncing the smiting proved, reversed, and both parties left to pay their own costs. *Scales v. Hoile*. 139

## CRUELTY.

- Less cruelty is necessary to revive condoned adultery, than to found an original suit. *Bramwell v. Bramwell*. 233

## D.

## DECLARATION.

- In a cause of legacy, a declaration given in instead of an inventory, pronounced not to be sufficiently full. *Winchlow v. Smith*. 473

## DELUSION.

1. Delusion has been generally laid down as an essential constituent of derangement. *Semble*, that insanity has never been held to be established in any case where delusion has at no time prevailed. *Wheeler v. Alderson*. 211
2. *Semble*, that a lucid interval then exists when the mind is apparently rational on all subjects, and no symptoms of delusion can be called forth. *ib.*

## DIVINE SERVICE.

Indecency during the performance of divine service not proved. The sentence of a Diocesan Court reversed. *Lloyd v. Owen*. 403

## DIVORCE.

1. The *lex loci contractus* as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile; and therefore a second marriage, had in Scotland on a Scotch divorce, (a vinculo) from an English marriage between parties domiciled in England at the times of such marriages and divorce, is null. *Conway v. Beazley*. 242
2. Quære, whether such divorce would be invalid if the parties were then bona fide domiciled in Scotland: still more, if that first marriage took place during a mere casual visit to England, both parties being at all times domiciled in Scotland. *ib.*
3. Established by reason of cruelty. *Whimore v. Whimore*. 296
4. A divorce a mensa et thoro, by reason of adultery, pronounced for. *Baily v. Baily*. 441

## DOMICIL.

1. A natural born British subject may acquire a foreign domicile; nor will the animus revertendi, and claim to be considered, and treatment as a British subject, preserve his original domicile—and, if domiciled abroad he must conform in his testamentary acts to the formalities required by the *lex domicilii*. *Stanley v. Bernes*. 140
2. The will and first two codicils of a British born subject, resident and naturalized in the Portuguese dominions, (the will disposing of effects partly in Portugal, and partly in England,) executed and purporting to be executed according to the laws of Portugal, but inferring that he considered himself an Englishman, admitted to probate; but two later codicils—fully proved as to capacity and intention, disposing solely of money in the British funds, attested by three witnesses, but not executed, nor purporting to be executed, according to the law of Portugal—refused probate by the Delegates, reversing a sentence of the Prerogative. *ib.*

## DRAFT WILL.

A draft of a will propounded, without setting forth how the executed will was lost, pronounced against. *Pinshallow v. Robinson*. 69, n.

## DUPLICATE.

A duplicate is a part of a will, and to be considered as a testamentary paper. *Killican v. Lord Parker*. 475

## E.

## ECCLESIASTICAL COURTS.

To what extent the sentence of Ecclesiastical Courts is binding on other Courts. 289, n.

## EVIDENCE.

1. The answer to an interrogatory confined to the point on which the party's solicitor was produced, is admissible, though he gained his information as solicitor. *King's Proctor v. Daines*. 91, n.
2. In a suit for nullity of marriage, an entry of baptism in 1820, (the marriage taking place in 1813,) reciting, that the party was "said to be born in 1795," is not admissible—either as proof of the non-age, or in order to prevent a suspicion of suppression of evidence. A letter from the father—two months after the marriage—expressive of his anger at the marriage is admissible as part of the *res gestæ*; and a subsequent de facto marriage of the woman with another man is pleadable to show, that the parties did not live together as husband and wife. *Duins v. Donovan*. 120
3. In the absence of proof that registers of Episcopal Chapels at Edinburgh are by the law of Scotland documents of an authentic and public nature, copies thereof rejected as inadmissible by the law of England. *Conway v. Beazley*. 242
4. An exhibit which might have been pleaded to establish identity cannot be pleaded as evidence. *Bird v. Bird*. 375
5. A question as to how far certain exhibits could, under any circumstances, be admitted as evidence. *Plunkett v. Sharpe*. 405
6. The confession of the proctor of a party contesting suit sufficient proof of the exhibits of the adverse party. *Hillyer v. Milligan*. 441

## EXCEPTIVE ALLEGATION.

A party cannot except to a witness by contradicting answers to interrogatories which go to incidental, collateral matter, and are not relevant to the issue. *Whish v. Hesse*. 251

## EXCOMMUNICATION.

1. A sentence of excommunication reversed, because it was clear from the process that the party had complied with the order of the Court, for the alleged neglect of which he was excommunicated. *Patten v. Castleman*. 365
2. Question as to regularity of an excommunication. *Pytt v. Fendall*. 389

## EXECUTOR.

1. An executor, who has renounced, may, any time before administration has passed the seal, retract. *McDonnell v. Prendergast*. 80
2. Any acts, which show an intention to take upon them the executorship, prevent executors renouncing: therefore the insertion of an advertisement calling upon persons to send in their accounts and to pay money due to the testator's estate to A. and B., "his executors in trust," held to make them compellable to take probate, and to subject them personally to the costs occasioned by their resistance; the estate being small and left for two years and a half without a representation. *Long v. Symes*. 266

3. If a person named executor intermeddles, however slightly, he cannot afterwards refuse to take probate, and if not named executor, he becomes so de son tort; but acts of necessity do not bind, and even if an executor has shown himself willing to accept, he may by the Court be dismissed in aid of justice. *ib.*
4. An informal declining by letter to take the office of executor is sufficient. Till the refusal is recorded in Court, no person can take the administration. *ib.*
5. The renunciation of an executor, rejected. *Pytt v. Fendall.* 447

F.

FACULTY.

1. A clause, providing against any future expense falling on the parish, need not be inserted in a faculty confirming the erection of an organ by voluntary contributions, and with the consent of the vestry, in a parish church. The sentence of Court below affirmed with costs. *Jay v. Webber.* 12
2. A faculty directing the performance upon and repairs of an organ in a parish church, to be paid out of the parish rates, would be legally objectionable; for the ordinary can only bind the parish to expense for articles absolutely necessary. *ib.*
3. Even if the vestry is unanimous, a clause binding the parish to defray, out of the rates, future expenses for an article not necessary, ought not to be inserted. *ib.*
4. A faculty, confirming the erection of an organ, binds the parish to nothing prospectively. *ib.*
5. It is no sufficient objection to the issuing of a decree with intimation to lead a faculty for erecting an organ in a parish church, that there is no provision for the future repairs, nor for the permanent salary of an organist. *Pearce and Hughes v. The Rector of Clapham.* 13
6. In a parish church an organ cannot legally be erected without a faculty, nor will a faculty be granted without a decree with intimation in order that any of the parishioners may object; on which objection the Court considering all the circumstances of the case is to decide. *ib.*
7. Where no substantial inconvenience was shown by one individual, who opposed the faculty, and when the plan had been adopted at a vestry on the unanimous report of a committee, the Court will grant a faculty to level a churchyard and lay flat upright head and foot stones, with a clause that no expense shall fall on individuals. *Sharpe v. Hansard.* 130

FEE.

1. The claim of a vicar for a fee on the wedding of one of his parishioners in the church of another parish, not substantiated. *Patten v. Castleman.* 390
2. The general principle of law is, that where no service is done, no fee can be due. *ib.*

G.

GUARDIAN *ad litem*.

The residuary legatee in trust having renounced administration cum testamento annexo for the purpose of being examined as a witness, the Court hesitatingly, but as matter of necessity appointed a next friend guardian ad litem in order to propound, on behalf of the minors, residuary legatees, the paper which their father opposed: but required the guardian to give security for costs. *Copeland v. Rivers.* 110

I.

INCUMBENT.

1. The whole cure of souls, and all the emoluments of a parish, belong, under the original endowment, to the incumbent and his successors, and vest in the existing incumbent by institution and induction. *Bliss v. Wood.* 188
2. Of common right the incumbent has the nomination of a minister to a chapel of ease within his parish. Exception proved in the present instance. *Line v. Harris.* 346

INSANITY.

1. Where clear and decisive insanity has been established at a prior time, acts of a doubtful character are of more force in proof of its existence at the time in question: and even subsequent decidedly insane acts may reflect back on acts otherwise equivocal; but when no decided acts, prior or subsequent, are proved, equivocal acts, however numerous, will not establish insanity. *Wheeler v. Alderson.* 211
2. Intoxication is temporary insanity, ceasing with the exciting cause. *ib.*

INSTRUCTIONS.

A testatrix executed a will, and thereupon destroyed a former will, and subsequently executed two other wills. The last will was propounded, but abandoned. A decree then issued calling on all parties interested to show cause why probate of the instructions for the first will should not be granted; and the Court, on proof per testes that the instructions were of the same effect as the first will, that that will was executed when the deceased was sane, but destroyed and the other wills executed when insane, pronounced for the instructions, and refused costs out of the estate to persons in distribution who by interrogatories set up insanity when the first will was executed. *In the Goods of Elizabeth Brand.* 257

INTEREST.

An interest established in a pedigree cause. Executors of the asserted next of kin condemned in costs. *Bouchier v. Horngold.* 437

## INTERVENTION.

A party who has no interest, cannot be permitted to intervene in a cause. *Brotherton v. Hellier.* 463

## INTESTACY.

In a case of intestacy, the security proposed held to be sufficient. *Cox v. Peck.* 449

## INVENTORY.

1. A physician not entitled to call for an inventory, as a creditor, for fees due from the deceased. *Von Solendahl v. Dr. Hampe.* 326
2. Objections to an inventory must be pleaded in an allegation. *Prentice v. Farrand.* 375
3. The Court has no jurisdiction to direct an inventory of a leasehold estate under lives which was held on a mortgage. An inventory ordered as to the other effects. *Saville v. Morgan.* 402
4. A party held not to have established his right to pray an inventory. *Lascelles v. Jobber.* 406
5. A creditor entitled to an inventory of the effects of an intestate. *Timbrell v. Rice.* 416
6. A release from a party in distribution to the administratrix of an intestate, held to be good till it should be set aside in a court of equity; and a bar also to a demand for an inventory and account; but not to be a bar to calling in the administration, for the purpose of putting the administratrix on proof of her marriage. *Millington v. Sorsby.* 437
7. If a creditor swears to a certain sum due to him, he is entitled to an inventory of the estate of an intestate. *Smith v. Pryce.* 454
8. When the Court decrees an inventory, it expects a full and satisfactory one to be given in. *Plunkett v. Sharpe.* 470
9. An administratrix with the will annexed called upon for a more full inventory, and then held to have fully administered. *Hendren, alias Shaw, v. Shaw.* 305
10. In a cause of legacy, a declaration given in instead of an inventory, pronounced not to be sufficiently full. *Winchlow, Adm. of Smith v. Smith.* 473

## J.

## JACTITATION OF MARRIAGE.

1. A suit for jactitation of marriage not sustained. Sentence in favour of the marriage. *Walton v. Rider.* 289
2. The sentence of a Spiritual Court in a suit for jactitation of marriage is not conclusive evidence of marriage to bar the House of Lords from proving the marriage on an indictment for polygamy. 289, n.
3. In a suit for jactitation of marriage, the woman admitted to her suppletory oath; the marriage which had taken place in Scotland established. *Weacombe v. Dods.* 306

## JURISDICTION.

Generally speaking, all ecclesiastical jurisdic-

tions are limited in their authority to property locally situate within their district. *Crosley v. Archdeacon of Sudbury.* 73

## L.

## LACHES.

On proof of the wife's guilt, the Court called for an affidavit from the husband explanatory of his delay to bring the suit; and, being satisfied therewith, pronounced the sentence. *Leader v. Leader.* 60, n.

## LEGACY.

1. The jurisdiction in personal legacies belongs to the Ecclesiastical Courts; it is exercised by the Archbishops in cases of all wills proved in the Prerogative Court, and by the official principals of each diocese, in cases of wills proved in the Diocesan Court. 63, n.
2. A legacy held to carry interest from three months after the death of the testator. *Harrison v. Rhodes.* 364
3. An executrix condemned to pay legacies. *Dent v. Dent.* 406
4. Legacy pronounced for. *Minty alias Misita v. Gould and Montgomery.* 396
5. A legatee brings a suit for his legacy. The executor admits the legacy, but pleads plene administravit, and exhibits an inventory and account. The legatee proceeds no further, and the executor is dismissed, but without costs. *Rumsey v. Tizard.* 442
6. In a suit for legacy, held that there were sufficient assets left by the testator to pay his debts and legacies. *Elliott v. Holwell.* 455

## LETTERS OF REQUEST.

The process of the Prerogative Court does not run into a royal peculiar, but must be served by letters of request. *Crosley v. Crosley.* 260

## M.

## MARRIAGE, (NULLITY OF.)

1. Lapse of time offers no bar to a suit for nullity of marriage, by license, by reason of minority and want of consent of the father. *Duins v. Donovan.* 120
2. A marriage by banns—where, by the consent of both parties, one of the Christian names of the man (a minor) was omitted for the purpose of concealment,—is null and void under stat. 4 Geo. 4, c. 76, ss. 7 and 22. Quære, if only one of the parties knew of the false publication. *Wiltshire v. Prince, otherwise Wiltshire.* 130
3. In a suit for nullity of marriage brought by the husband, a de facto marriage being admitted, the husband is to bear the expenses of the wife. *Bird, alias Bell, v. Bird.* 366
4. Where the interest of a daughter, claiming administration to her father, is denied, it will be sufficient if she establishes the marriage of her parents by reputation and cohabita-



- tion; but she is bound to show the time and place of her own birth. *Lady Mayo v. Brown*. 369
5. Where marriage is pleaded in bar to the interest of an asserted widow, strict proof of the marriage is required. *Taylor v. Taylor*. 454
  6. A suit for restitution of conjugal rights, in the case of a Fleet marriage; the marriage established. *Grant v. Grant*. 463
  7. A case of nullity of marriage, by reason of a former marriage, established. Alimony to second wife refused. *Bird, alias Bell, v. Bird*. 470
  8. A contract of marriage proved. The husband enjoined to solemnise the marriage in church, within sixty days after he should be served with a monition for that purpose. *Baxter v. Buckley*. 301
  9. In a suit for adultery brought by the husband, the wife appears under protest, and alleges a prior marriage.—The question of the former marriage must be determined before the question of adultery is gone into. *Robins v. Sir William Wolseley*. 467
  10. A question touching the validity of a Fleet marriage. Marriage not sufficiently proved. *Conran v. Lowe*. 471
  11. In a matrimonial cause, a husband is liable to pay the costs of the wife. *Fitzgerald v. Fitzgerald*. 472

#### MINOR.

- Administration agreed to a guardian elected by the free consent of a minor. *Rich v. Chamberlayne*. 340

#### MONUMENT.

The ordinary may order a monument to be taken down, if it is inconveniently placed in a church; if it does not interfere, the parson's authority to erect it sufficient. The suit in this case was instituted in a wrong form; it ought to have been by articles. *Hopper v. Davis*. 472

#### O.

#### ORGAN.

1. In collegiate churches organs may be necessary, but not in a parish church. *Jay v. Webber*. 12
2. The ordinary is to judge whether the circumstances of the parish offer no objection to the erection of an organ: the parish alone is to decide on any expenses to be incurred. *ib.*

#### P.

#### PAPER TESTAMENTARY.

A paper, written by the deceased herself—at least three months before death—with a blank for the dates, an attestation clause—but no witnesses, and unsigned, with other

evidence to show it unfinished; and declarations that she intended to "settle her will in a few days," is not entitled to probate, either as intended to operate in its actual state, nor on the ground that the execution was prevented by her sudden death the day after such declaration. *Bragge v. Dyer and Others*. 78

#### PARISH CLERK.

1. A proceeding against a parish clerk for deprivation, ought to be plenary, and by articles. If a parish clerk is nominated by the parishioners he is a temporal officer; whereas if he is nominated by the incumbent, he is a spiritual officer. *Barton v. Ashton and Gray*. 376
2. Articles admitted against a parish clerk: he appeals to the Court of Arches, and applied to the Court of King's Bench for a mandamus: not competent to him to proceed in both Courts; assigned to declare which he elects. *Barton v. The Rev. Mr. Ashton*. 411

#### PAUPER.

A respondent may be admitted as a pauper in the Court of Appeal; and the Court looks at his *faculties* at the time of his application, not at what he may have been possessed of at a former time. *Taylor v. Morse*. 67

#### PECULIAR.

1. Royal peculiars being altogether independent of the Archbishop, the will of a deceased who left goods in two royal peculiars, in one of which he died, and other goods in one diocese only within the province, is rightly proved in the royal peculiar where he died. The executor, who so proved the will and appeared under protest to a citation calling upon him to take a Prerogative probate, dismissed. *Smith v. Smith and Others*. 259
2. Quære, whether the probate of one royal peculiar will authorize the administration of goods in another? *ib.*
3. If a deceased died in a royal peculiar, and left bona notabilia in two dioceses within the province, the Prerogative Court must grant probate on an office copy or exemplification of the royal peculiar probate. *ib.*

#### PEW.

1. A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew had for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew. On the plaintiff declaring he proceeded no further, the Court dis-

- missed the defendant with a sum nomine expensarum, refusing to give full costs on the ground that there had been irregularities on both sides. *Blake v. Osborne.* 251
2. By the general law, the use of all pews belongs to the parishioners, who are to be in the first instance seated by the churchwardens, subject to the control of the Ordinary. *ib.*
3. On the expiration of a faculty limited to a certain period, the right of the parishioners to the pews, the subject of such faculty revives. *ib.*

### PHYSICIAN.

- A physician not entitled to call for an inventory, as a creditor, for fees due from the deceased. *Von Solendahl v. Hampe.* 326

### PLEADING.

1. In a criminal suit, a defensive plea tending to show the Promoter's motives to be malicious or vindictive, is admissible, as bearing on the credit of his witnesses and on costs; but it must be specific, and confined to his conduct with reference to the defendant. *Bennett v. Bonaker.* 13
2. A defensive plea in a criminal suit having imputed to the promoter malicious motives, the court is bound to admit a plea repelling such imputations; and presentments, by the churchwarden and vestry, of the clergyman's misconduct are admissible for such purpose, though not as matters of charge or proof in the original articles. *ib.*
3. Length of time, though it may not amount to a bar to a criminal suit, will induce the court to admit general explanation, instead of requiring a direct contradiction or explanation of each specific fact. *ib.*
4. *Seemle*, that the husband, by pleading that the wife slept at his house on the night after the last act of adultery charged, (of which adultery he was at the time informed,) takes on himself the onus of showing that they did not sleep together on that night—though, generally speaking, the party relying on condonation as a bar, should plead it. *Timmings v. Timmings.* 23
5. The notoriously debauched character of the paramour, his exclusion from all respectable female society, the introduction of him by the husband to his wife, the encouragement of their intimacy, the allowing her to accept a supply of money from him, expostulations from her family at such intimacy, the refusal of the husband to attend to them, and improper familiarities and liberties in his presence, and without his remonstrance, are material facts in a plea of connivance. *Moorsom v. Moorsom.* 28
6. Indifference, ill-behaviour, or cruelty, is not pleadable, in answer to a charge of adultery, nor relevant to a plea of connivance. *ib.*
7. As a plea of connivance must generally be circumstantial, and consist of many facts, trifling when taken separately, but altogether convincing, the Court must allow a latitude in such a defence. *ib.*
8. Much delay having occurred in the wife's defence, a plea of minute facts to establish connivance having been admitted, and the cause now standing "to propound all facts," an allegation of the wife, not responsive, but pleading more minutely, but to the same effect as in the former plea, rejected in toto; the facts not being novita preventa. *ib.*
9. The whole substantive case of a party should be at once brought before the Court; but where it is clearly shown that the facts could not have been sooner pleaded, additional articles may be given in. *ib.*
10. An allegation, on the part of the executors, responsive to a libel in a suit of subtraction of legacy, and pleading circumstances de hors the will, is admissible to explain a latent ambiguity as to the object of the bequest; but the Court rejected the testator's declarations to the drawer of the will, as inconclusive, and expressed a strong disinclination to their admission, in such a suit, under any circumstances. *Capel v. Roberts and Neeld.* 60
11. On appeals from definitive sentences, matter which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined below, is not admissible: but matter more generally responsive may with caution be received, especially where the cause has not been properly conducted in the Court below. *Price v. Clark.* 103, n.
12. Where a libel pleaded facts, 1st, to establish the adultery of the wife; 2nd, to show that the husband had not forfeited his claim for relief by misconduct, the Court directed parts to be reformed on the several grounds of too great minuteness, hearsay, and pleading the contents of a letter—not exhibited, nor accounted for; and admitted the rest. *Craft v. Craft.* 120
13. In considering the admissibility of pleas, the Court must be cautious not to exclude matter essential to a due decision, nor allow proceedings to extend to an unnecessary length; but if a serious doubt arises as to the ultimate effect of any averment it should be admitted. *ib.*
14. Though the Court will not, on presumption and in the absence of matter strongly inculpatory, impute connivance to the husband, it will not debar him from pleading that which makes the history consistent and natural. *ib.*
15. That the conduct of the wife, during the absence of her husband, was so indecorous as to induce a lady, with whom she resided, to recommend her removal to her mother, is pleadable. *ib.*
16. On a negotiation between the husband and third parties, in the wife's absence, relative to his receiving her back,—that the husband declined, as it did not appear that her conduct had changed, is not pleadable when unnecessary to his justification. *ib.*

17. Where parties are living separate, the commencement of the acquaintance with the alleged paramour, and of the suspicions of the person under whose care the wife was, should be set forth circumstantially. 120
18. Where the wife engaged in an improper communication with the paramour, was compelled to retire, the whole transaction may be pleaded. *ib.*
19. Where a letter is pleaded to be in the possession of the adverse party, the contents may be set forth at length, leaving the other party, if she pleases, to produce the letter. *ib.*
20. A declaration of the paramour, in the wife's absence, that she had committed adultery previous to the adultery charged in the libel, is not admissible; but a declaration, in her presence and confirmed by her, is: and the Court cannot reject it on the ground of its reflecting on third parties, nor that it does not establish adultery previous to the charges in the libel. *ib.*
21. In an allegation of faculties, the amount of capital embarked, or the particulars of partnership concerns, is not to be set forth, but only the income. *Higgs v. Higgs.* 186
22. In matrimonial suits, the libel must contain all facts that can by diligence be ascertained at the time, and subsequently, new facts only—which are nearly conclusive of guilt—can be pleaded. The Court, on appeal, affirmed the rejection of additional articles, on the ground that the facts might have been pleaded originally, and were inconclusive. *Story v. Story.* 251
23. An allegation pleading that a will made at Batavia containing a revocatory clause, dispositive, and duly executed, was not intended to revoke or to dispose, rejected. *Phillips v. Thornton.* 254
24. In an interest cause, if the time and place of the marriage of an ancestor cannot be set forth, it is necessary to plead cohabitation and reputation. *Chamberlayne v. Dart.* 390
25. The custom of gravelkind must be pleaded, for it is the *lex loci* and not the *lex terræ*. *Jehen v. Jehen.* 390
26. Articles of an allegation which had been in substance pleaded before, rejected, but letters allowed to be pleaded in supply of proof. *Braddyl, formerly Jehen v. Jehen.* 454
27. An application for an administration pendente lite, rejected, because no special cause for granting it was set forth. *Sutton v. Smith.* 365
28. An appeal pronounced for, on an understanding that the cause should be retained, and the adverse proctor should declare in acts of Court that he admitted certain points. *Stephens v. Webb.* 368
29. An administration decreed to a widow under a caveat, not to be stopped from passing the seal by a second caveat. *Wingfield v. Wingfield.* 372
30. A fraudulent administration revoked. *Drummond v. Hamilton.* 378
31. Admission of an allegation opposed on the ground that the party giving it in had been condemned in costs, which remained unpaid,

- but as no monition to enforce the payment had been served on him, the objection was not sustained. *Smith v. Corry.* 402
32. An allegation offered after publication, rejected. *Herbert v. Helyar.* 411
33. Administration to the estate of an intestate contested by two persons, who each claimed to be his widow. Administration pendente lite granted to the nominee of the one who was living with him at the time of his death, the nominee to lodge the money as received in the bank. *Taylor v. Taylor.* 438
34. An allegation admitted in an interest suit. *Shand v. Gardiner.* 439
35. An allegation in a suit touching the validity of a marriage, pleading irrelevant matter, rejected. *Birl v. Bird.* 441

### PRACTICE.

1. The Court, before granting administration to a creditor, requires an affidavit of the amount of the effects, and of the debt, and that the creditor has no other security. 72, n.
2. In granting administration, with a will annexed, to a legatee, on a service on the Royal Exchange, and on an affidavit that there was no agent in this country; the Court observed, "here the party having died in Jamaica, in 1823, the residuary legatee living there, and no steps having been taken to prove the will for so long a time, I will grant this administration to the grand-daughter, who is a legatee; but it is to be understood, that, generally, where the parties interested are only in the West Indies, the Court will require notice to be given them by a requisition." *Norrington v. Nembhead.* 110, n.
3. After publication, in a suit for separation for the husband's adultery, the Court will not, in the first instance, delay the hearing, in order that the wife may counterplead her letters annexed to the husband's interrogatories, from which connivance, or a par delictum, (neither pleaded,) is to be inferred; but sensible, that it will not ultimately allow her to be barred by reason of such letters without affording her an opportunity of explaining them. *Turton v. Turton.* 130
4. According to the practice of Ecclesiastical Courts, documents annexed to the interrogatories, cannot be known to the other party to have been so annexed, till publication of the evidence has passed; and when, without special leave, no further plea, unless exceptive, can be admitted. *ib.* 137, n.
5. A party entering a caveat, and alleging himself to be an executor in the last will of the deceased, without inserting the date; has a right to call for an affidavit of scripts, without swearing as to his belief that he is an executor in some paper left by the deceased; and sensible, without being liable to costs. *Antrobus v. Leggett.* 232

### PREROGATIVE COURT.

1. Although the Prerogative cannot try a debt, yet it can try whether the affidavit of a debt is sufficient. *Francia v. Alterenza.* 359

2. Where there is no doubt as to the factum of a will which contains no disposition of the residue, the Court of Probate cannot pronounce the deceased to be dead intestate as to the residue. *Sutton v. Smith.* 370

## PRESUMPTION.

1. The law presumes prima facie, 1st, that if a paper (a will) be left at a party's house, it comes into his possession: 2dly, that if it be thus traced into his possession, and be not forthcoming at his death, he destroyed it. A draft will being propounded under these circumstances, the Court pronounced the deceased was, as far as appeared, dead intestate, and condemned the party setting up the paper in costs. *Lillie v. Lillie.* 67
2. Cancellation of one duplicate a cancellation of both. In deceased's custody, must be presumed to be cancelled by deceased. *Bouhey v. Sir William Moreton.* 70
3. Where a criminal connexion is once shown, its continuance is presumed where the parties live under the same roof. *Turton v. Turton.* 131

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1. Probate (as of a codicil) refused to a paper as not testamentary, though found in the same envelope as the will and a codicil, and explanatory to the executors of the nature and value of, and most advantageous mode of managing the deceased's property, but having no dispositive or revocative effect. *Taylor v. D'Egville and Bebb.* 76
2. The party, setting up, as a will, a paper not on its face testamentary, must show testamentary intention; and as the law in such cases lends its aid only to effect intention, the question is, whether such a paper, if treated as testamentary, will, in truth, give effect to the deceased's intention, though the Court cannot look at the effect of an instrument clearly testamentary on its face. An administration with a paper having the character of a donatio inter vivos annexed, revoked, since, if treated as testamentary, the deceased's intention would be defeated. *The King's Proctor v. Daines.* 83
3. If there is proof, either in the paper itself, or from a clear evidence dehors, 1st, that the writer intended to convey the benefits by it which will be conveyed if the paper be considered testamentary; 2dly, that death was the event to give it effect, an instrument, whatever be its form, may be admitted to probate. *ib.*
4. The answer to an interrogatory, confined to the point on which the party's solicitor was produced, is admissible, though he gained his information as solicitor. *ib.*
5. Without the consent or citation of the next of kin, the Court will not, on motion, supported by affidavit of the drawer (the executor and a legatee), grant probate of a will, unsigned, dated some years before, and with an attestation clause and no witnesses, and a recent codicil with a space between the last clause and signature. *In the Goods of Elizabeth Adams.* 100
6. Where the attesting witnesses—disinterested medical men—speak strongly to sanity, the Court will not set aside a will on proof by interrogatories, but without plea, that the deceased, many years before, had been under an insane delusion. *Kemble and Smales v. Church.* 107
7. The Court will not pronounce for a paper on the evidence of handwriting alone, but that proof joined with circumstances of probability is sufficient. *Headington v. Holloway.* 110
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10. The will (executed eight years before death,) of a woman, who, though guilty of excessive drinking and great extravagancies, managed her own property, received her dividends, did various acts of business, corresponded rationally with her friends, and was not shown to be under any delusion, cannot be set aside on the ground of insanity; and though such will—in total exclusion of distant next of kin (with whom she had quarrelled)—be in the handwriting of, and executed at the office of, her attorney (one of the executors and residuary legatees to a great amount, he and his family having also very large legacies,) and the attesting witnesses speak to a bare execution; documents in her own handwriting, showed both capacity and knowledge of contents, though not mentioning the residue, will supply the additional proof required by such circumstance. *Wheeler and Batsford v. Alderson.* 211
11. The husband and wife having been drowned together, the Court (the wife's next of kin not opposing) granted probate, in common form, of the husband's will to executors substituted "in the event of her dying in his lifetime," the will appointing her executrix "if living at his decease." *In the Goods of Henry Selwyn.* 254
12. When probate of a will and codicil, both prepared by the same person, who was also an attesting witness, was called in, and the executor was put on proof of the codicil by a niece, who pleaded incapacity from apoplexy, without suggesting fraud, circumvention, custody, control, or the improbability of the disposition, the Court (having, on the admission of a responsive allegation, strongly intimated its opinion that the opposition was

hopeless,) at the hearing, the cause being unopposed, condemned the niece in costs. *Waters v. Howlett.* 275

13. Two executors gave a letter of attorney to a third person to take administration cum testamento annexo. One of the executors dies, the other has a right to call in the letter of attorney, and to take the probate of the will. *Pipon v. Wallis.* 391

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Semble, that a diocesan probate can give no authority, nor continue any privy, as to a satisfied term in another diocese. *In the Goods of Mary Powell.* 72

#### PROCTOR.

1. On complaint against a proctor, of an extortionate charge (88*l.* 4*s.* 4*d.*) for taking out probate in common form, the bill was referred to the registrars, who reported the proper charge to be 52*l.* 15*s.* 8*d.* The Court suspended the proctor for three months, and condemned him in costs; it being the first time his conduct had been brought before the Court, and a medical certificate of his inability to attend to business, when the bill was delivered, being produced. *In the Goods of Lady Hatton Finch.* 100

2. Where a bill of particulars for business done in the Court of Delegates had been recently delivered, though a general account had been rendered, settled, and paid, three years before, the Court, on petition, (though such petition contained impertinent matter) directed the bill to be examined by the registrar, in order, 1st, that the suitor might decide as to proceeding in other Courts, to recover the excess (if any); 2dly, to found a complaint against the proctor, if the charges were exorbitant or fraudulent; but the Court cannot notice an asserted undertaking that disbursements only, and those not exceeding a certain sum, should be charged; nor will it make an order for the production of vouchers; which, if demanded, are produced as of course before the registrar. *Peddle v. Toller.* 112

3. On the registrar's report—that the bill was just and reasonable—and on the proctor for the complainant declaring he proceeded no further, costs against the petitioner were not given, only because he was almost a pauper. *ib.*

4. The Court will exert all its powers to restrain proctors from undertaking causes on condition of sharing in the effects, or of any benefit beyond the payment of fair costs. *ib.*
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to be disannexed; but semble, that, if at the hearing, the letters appear important, it will then allow the admissibility of the allegation to be debated. *Turton v. Turton.* 131

### RESTITUTION OF CONJUGAL RIGHTS.

1. Though in a suit for separation on account of the wife's adultery, the wife be entitled to her dismissal on the ground of the husband's connivance at her incest with her brother, it did not necessarily follow, that, in a suit for restitution of conjugal rights, the Court would compel the husband to return to an incestuous bed. *Dennis v. Dennis.* 138, n.
2. On a suit for restitution the defendant must be compelled to return, unless it be proved that the plaintiff's inherent right is forfeited; but semble, less strict proof of cruelty or adultery is necessary, in answer to such a suit, than where the party making these charges is the original complainant. *Bramwell v. Bramwell.* 232

### S.

#### SEPARATION

*a menaa et thoro.*

The 105th canon requiring that divorce should not go on confession alone, the Court is almost bound to reject an affirmative issue in a suit for separation for adultery. *Crewe v. Crewe.* 45

### SIMONY.

1. Simony, on the part of a presentee to a living, being in law a very odious offence, and the consequences of conviction thereof highly penal, the law, even if a simoniacal agreement is established, requires the strictest proof of the presentee's privity thereto before induction, or of his confirmation thereof after; so, in proof that a clerk is simoniace promotus, a corrupt agreement must be no less conclusively shown. In a criminal suit against a clerk for simony, and for being simoniacally promoted, the Court holding, 1st, that neither his privity to, nor confirmation of, any simoniacal contract was proved.—2dly, that no criminal contract was established,—dismissed him from the suit, and condemned the promoters to costs.

Semble, that when a clerk is simoniace promotus without his privity or subsequent confirmation, the Ecclesiastical Court cannot proceed to a sentence of deprivation in a criminal suit. *Whish and Woodlatt v. Hesce, Clerk.* 251

2. Quere, whether acts subsequent to induction in confirmation of a simoniacal agreement made without his knowledge, amount to simony on the part of the presentee? *ib.*

### STATUTE OF FRAUDS.

The statute of frauds does not prohibit the introduction of parol evidence, to prove the fact of a will having existed subsequent to the will found on the death of the alleged testa-

tor. Established by proof that a latter will, with a different executor which did not appear, had been made. *Helyar v. Helyar.* 416

### SUIT.

A suit carried on by the attorney of an executor does not abate on his death, a proxy having been originally exhibited for one of the executors, as well as for the attorney of the executors. *Grant v. Atkinson.* 351

### SUPPLETORY OATH.

Directed by the Court to be taken by a woman in a suit for jactitation of marriage. *Grace v. Calemberg.* 314

### SURETIES JUSTIFYING.

Justifying security is called for at the Court's discretion, according to the circumstances of each case, save that there is one general rule, that in all cases where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required; and if the party first entitled is abroad, the decree must be served on the royal exchange and on his agent, or an affidavit must be made that he has no agent in this country. 72, n.

### T.

#### TITHE.

1. If a person has lands in the parish in which he has cattle for the plough and pail, he is not excused from paying tithes for unprofitable cattle depasturing in another parish. The vicar having insisted on a modus for a less sum than he would be entitled to for tithes of common right, it is not necessary for him to prove the modus in the fullest manner. *Harry v. Littleton.* 365
2. In a suit for subtraction of tythes, a tender held to be sufficient. *Stevens v. Webb.* 411
3. A proceeding by a lay impropiator, for the recovery of tythes under 2 Ed. 6, c. 13. *Hon. Robert Herbert, Esq. v. Hellyer.* 442
4. In a suit for tythes, sentence carried into execution as to costs after an appeal had been interposed. *Herbert v. Hellyar.* 453
5. A lessee of the vicarial tithes must exhibit the original lease and agreement as the foundation of his claim. *Riler v. Cousins.* 474

### TRUST.

A trust under a will held to have expired, because it had not been filled up according to the direction of the testator. *Harris v. Jones.* 353

### V.

#### VERDICT.

1. An allegation—pleading a verdict in ejectment, and the remarks of the Judge thereon, and the names of the witnesses examined—rejected. *Grindall v. Grindall.* 101
2. A verdict, in an action of ejectment, cannot



be pleaded in a testamentary cause. *Price v. Clark.* 103

### W. WILL.

1. A will of a feme covert, made during marriage under a settlement, is not revoked by her surviving the husband. *Morwan v. Thompson.* 93
2. Deceased having, under a trust deed, power to dispose of certain effects by a will attested by two witnesses, such a will is revoked by a subsequent will containing an express revocatory clause, duly executed, but attested only by one witness; the disposition intended by the deceased being thereby completely effected. *Richardson v. Barry.* 97
3. Where a will is impeached on the ground of fraud, the parties who seek to establish the will must remove or explain and so neutralise the facts out of which the suspicion arose. *Wyatt v. Ingram.* 183
4. The relation of client and attorney between a testator and the person benefited by his will excites suspicion. *ib.*
5. An executed fair copy was pronounced for; the will itself, though it was known to have been in the deceased's possession, not being found on his death. *James v. James.* 67, n.
6. Testatrix having (without destroying the seal or signature) partially mutilated a duplicate will, but retained in her own possession and carefully preserved entire the whole duplicate, such mutilation is neither a total nor partial revocation. On evidence of uninterrupted affection for the parties benefited, will pronounced for. Costs out of estate. *Roberts v. Round and Others.* 198
7. The presumption being that a will when executed contains the deceased's final intentions, to authorise an alteration on the ground of mistake, there must be 1st, an ambiguity in the paper; 2dly, clear proof of the omission.  
Allegation pleading omission rejected. *Shadbolt v. Waugh.* 209
8. A married woman—executrix—and having private property, over which she had and exercised an appointing and disposing power, can continue the chain of executorship. *Birkett v. Vandercom.* 255
9. A latter will, disposing of realty and personalty, containing a clause of revocation and uncancelled, is not revoked and a former will revived by reading over the former will, and by parol declarations, unaccompanied by acts that it was his last will,—the former will being found carefully deposited and locked up in a drawer, and the latter will, though in the same drawer, lying among useless papers; and all the devices and legacies passed. *Daniel v. Nockolds.* 269
10. Probate granted of an unexecuted will, the intention of the deceased being clear, and the due execution of the instrument having been prevented by sudden incapacity superinduced by the violent conduct of his wife, who was interested in thwarting that intention.

Probate of a will of later date (i. e. the next day,) refused, because it had been extorted from the deceased by the importunity of his wife. *Lamkin v. Babb.* 261

11. Memorandum for a will, written on the back of a letter, established as a will. *Price v. Scott.* 287
12. The legatees to three testamentary schedules cited by the executor under a will to propound all or any of these schedules; schedules pronounced against. *Trotman v. Trotman.* 286
13. A will proved per testes. *Tregayle v. Menell.* 288
14. Will proved at Totness by Baines; subsequent will proved in Prerogative by Tew; Baines was cited to bring in her will, &c. *Tew v. Baines, alias Forrester.* 289
15. An application to compel the widow of a party deceased, to be examined on interrogatories, touching the cancellation of a will, rejected. *Winford v. Hellier.* 299
16. An administratrix with the will annexed called upon for a more full inventory, and then held to have fully administered. *Hendren v. Shaw.* 305
17. Will set aside on the ground of fraud, and for failure of proof with respect to handwriting. *Grace v. Calenberg.* 314
18. The capacity of a testator established. *Spencer v. Hawkins.* 328
19. Will of a wife, made on the presumption that her husband was dead, revoked. *Bransby v. Haines.* 335
20. A will propounded and proved. *Briscoe v. Bradish.* 337
21. A will propounded and established; administration cum testamento annexo, granted to the residuary legatees, the executors having renounced. *Bigg v. Keen.* 337
22. A will made in extremis established. *Martin v. Wotton.* 338
23. In a suit touching the validity of a will, the Court refused to make an order on the party propounding the instrument, to oblige him to declare that he never would hereafter propound any other of the testamentary papers then before the Court. *Winford v. Hellier.* 341
24. Will set aside because it was not the free and voluntary act of the deceased. *Ilgrinson v. Colcol.* 342
25. A will withheld by a creditor ordered to be brought in on the application of the executrix. *Bethun v. Dinmure.* 346
26. An imperfect testamentary schedule pronounced against. *Hervart v. Guise.* 346
27. Administration of a noncupative will, decreed to one of the principal legatees. *Hurrell v. Hurrell.* 350
28. An administration revoked on the production of a will. *Baker v. Russell.* 350
29. A person who had been party to a prior suit, touching the grant of an administration cum testamento annexo, held to be barred from instituting here proceedings for the purpose of claiming the administration as residuary legatee. *Thomas v. Davis.* 351

30. Not necessary that a testator should be in his senses at the time alterations are made in his will provided he was so when he directed the alterations. *Seeman v. Seeman.* 356
31. The forgery of a will not established. *Renault v. Saulnier.* 368
32. A codicil not admitted to probate for want of sufficient legal proof. *Jodrell v. Crop.* 371
33. The executor of a latter will put upon proof by the executor of a former will. Latter will established—no costs. *Lovett v. Harkness.* 371
34. Importunity not established. *Judge v. Mann.* 372
35. A noncupative will established. *Freeman v. Freeman.* 374
36. A will and codicil propounded by the executors in a common condidit, the next of kin by special proxy, admits the allegation modo et forma. *Taylor v. Cox.* 375
37. Probate of a will revoked, on failure of proof of the identity of a testator. *Murphy v. Mason.* 376
38. The latter of two wills established. *Gardiner v. Johnston.* 378
39. A mariner's will which has been given as a security for a debt, held to be void. *Moore v. Stevens.* 394
40. Probate of a former will revoked, in order that probate might be given of a later will. *Last v. Brown.* 403
41. Will found with the seal torn off, in the repositories of the deceased; held that the act was done animo cancellandi. Declarations by the deceased on his death-bed not deemed to be sufficiently specific to revive the will. *Davies v. Davies.* 407
42. The capacity of a testator established. *Lethes v. Edsforth.* 411
43. The execution of a second will of a different purport from the first, is by law a revocation of the first, though the second may not appear. *Helyar v. Helyar.* 416
43. It is a presumption of law that a will never out of deceased's custody, and not appearing at his death, has been destroyed by the deceased. *ib.*
45. Some act of revival is necessary to republish a will which has been destroyed by the making of second will of a contrary tenor. *ib.*
46. The revocation of a will established. *Cox v. Thompson.* 440
47. It is not competent to a creditor to dispute the validity of a will. *Burroughs v. Griffiths.* 443
48. Where no person who has a right to oppose a will appears, the court is not bound ex officio to call upon the next of kin to appear. *ib.*
49. A will propounded not sufficiently proved to be the act of the deceased. *Lloyd v. Nevill.* 449
50. A mariner's will proved at Boston, in New England, not established. *Jenkins v. Bayley.* 453
51. The capacity of a testator established. *Firth v. Finch.* 457
52. A will sufficiently proved, although no proof could be given either of instruction, or of the hand-writing of the deceased. *Anderson v. Welch.* 457
53. A codicil admitted to probate, which had not originated with the deceased, but which had been approved and executed by him. *Wise v. Johnson.* 464
54. A seaman's will made to secure a debt, pronounced to be void. *Keeling v. McEgan.* 467
55. All testamentary papers are to be brought into the Prerogative Court, when required. A duplicate is a part of a will, and to be considered as a testamentary paper. *Killican v. Parker.* 475

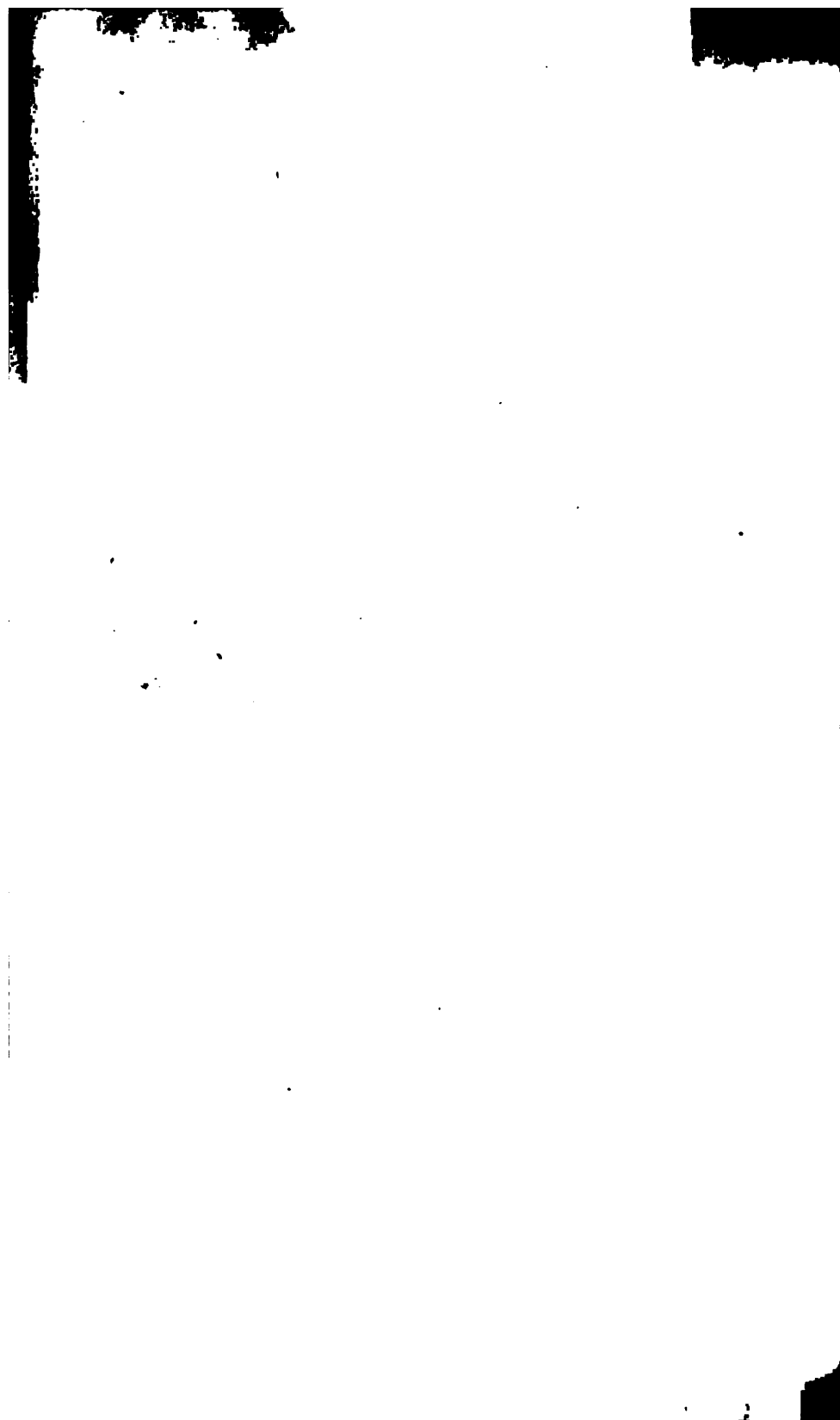
## WITNESS.

1. Witnesses should be required to answer to their belief or impression, as to whether adultery has been committed or not, though the Court cannot rely on such opinion. *Crewe v. Crewe.* 45
2. Witnesses speaking to transactions and conduct spread over many years, and not to specific facts fixed by time, place, and circumstances, are apt honestly to describe occasional extravagancies as constant and perpetual habits. *Wheeler v. Alderson.* 211
3. The improbability of his evidence is not sufficient to discredit a witness of good general character speaking firmly and solemnly, unless such improbability amount almost to absolute incredibility, and be incapable of explanation. *Whish v. Hesse.* 251
4. A witness produced and examined who had a legacy of a ring under a will, without renouncing or receiving his legacy. Application before publication that his disposition should be suppressed, and that he should renounce his interest and be re-examined, acceded to. *Sudyer v. Man.* 363
5. A witness who had been examined in chief under a commission, but had been prevented by illness from being examined on interrogatories before the close of the commission, allowed to be reproduced and examined on interrogatories at the expense of the party who produced her. *Winford v. Hellier.* 369
6. A witness having an expectation of interest and advantage, in case the will should be established, held to be incompetent. *Frank v. Carr.* 391
7. A legatee consents to release his interest that he may be examined as a witness. Some specified legacies are omitted in the release. The Court allowed the witness to exhibit another release, and to be repeated to his disposition. *Firth v. Finch.* 404
8. An application to examine witnesses de bene esse, rejected. *Hibben v. Calenberg.* 449









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